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685
NO. 2007

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

TRANSCRIPT OF RECORD.

(IN FOUR VOLUMES.)

THE EASTERN OREGON LAND COMPANY,
(A CORPORATION),

Appellant,

vs.

THE WILLOW RIVER LAND AND IRRIGA-
TION COMPANY (A CORPORATION),

Appellee.

VOLUME I.

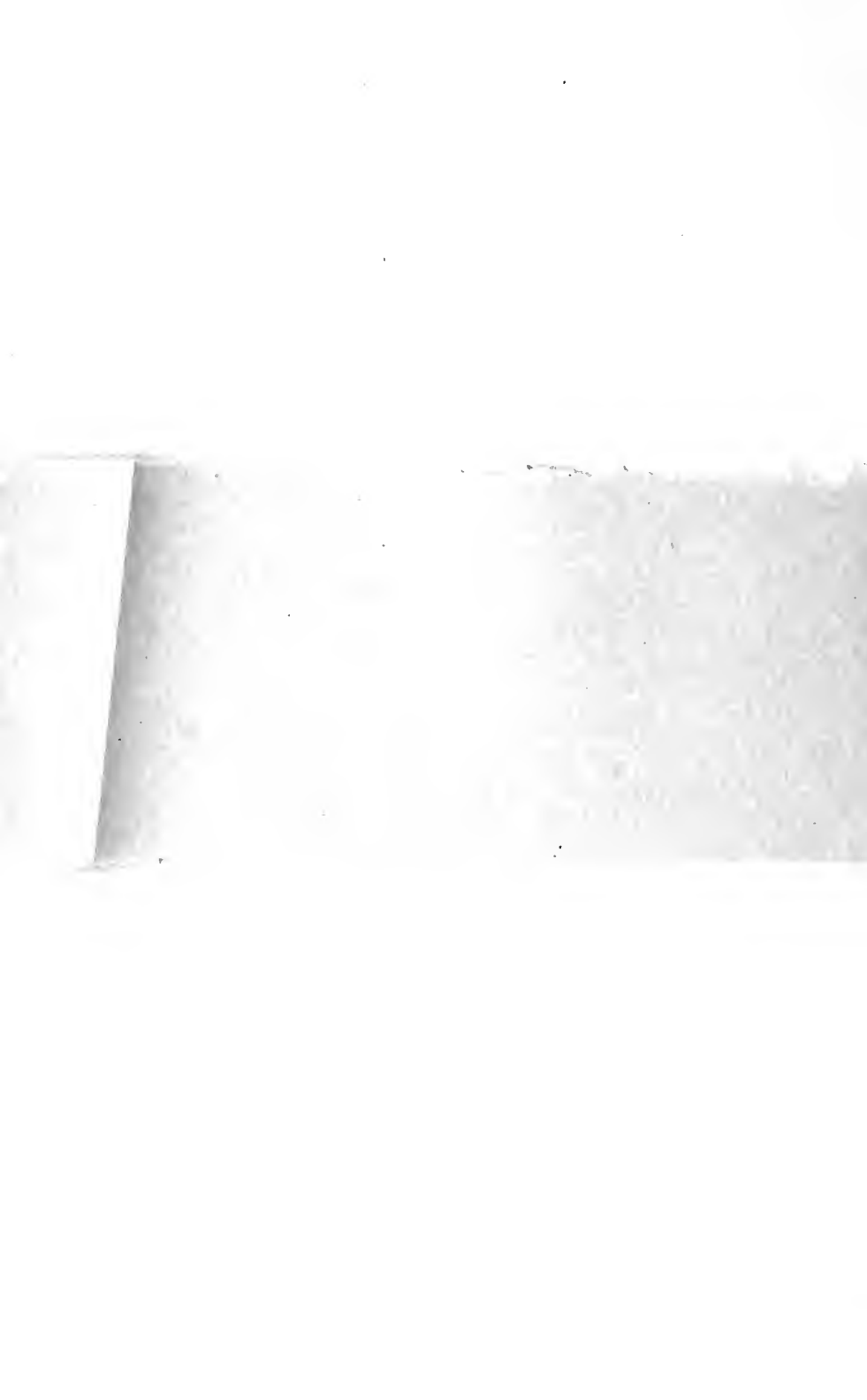
(Pages 1 to 240, Inclusive.)

Upon Appeal from the United States Circuit Court
for the District of Oregon.

FILED

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Records of U.S. Civil & Court
of Appeals
689



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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Addresses and Names of Attorneys of Record.	1
Amended Bill of Complaint.	3
Answer.	13
Assignment of Errors on Appeal.	1062
Bill of Complaint, Amended.	3
Bond on Appeal.	1070
Certificate of Clerk Circuit Court to Transcript of Record.	1075
Certificate, Special Examiner's, to Testimony and Exhibits.	1026
Citation on Appeal (Original).	1
Complainant's Objections to Certain Exhibits.	39
Complaint, Amended, Bill of.	3
Examiner's, Special, Certificate to Testimony and Exhibits.	1026
Exhibits, Transcript of Testimony and.	56
EXHIBITS:	
Exhibit "A" (Diagram).	1041
Exhibit "B" (Diagram).	1042
Exhibit "C" (Diagram).	1043
Exhibit "D" (Diagram).	1044

	Index.	Page
EXHIBITS:		
Exhibit "E" (Diagram).....		1045
Exhibit "F" (Diagram).....		1046
Exhibit "G" (Diagram).....		1047
Exhibit "H" (Diagram).....		1048
Defendant's Exhibit "I" (Diagram).....		1049
Defendant's Exhibit "J" (Diagram).....		1050
Defendant's Exhibit "K" (Diagram).....		1051
Defendant's Exhibit "L" (Diagram).....		1052
Defendant's Exhibit I (Letter Dated Sep- tember 30, 1909, from W. R. L. & I. Co. and E. O. L. Co. to F. R. Davis).....		918
Defendant's Exhibit II (List of Instru- ments Furnished in Case).....		920
Defendant's Exhibit III (Deed Dated May 20, 1908, from J. W. Insenhofer et al. to Willow River Land & Irrigation Co.)		929
Defendant's Exhibit IV (Placer Location Notice Dated June 27, 1903, Signed by J. W. Insenhofer).....		935
Defendant's Exhibit V (Placer Location Notice Dated October 15, 1870, Signed by J. G. Green).....		936
Defendant's Exhibit VI (Deed Dated Janu- ary 3, 1895, from J. F. Weaver and Kate A. Weaver to J. W. Insenhofer, et al.).....		938
Defendant's Exhibit VII (Deed Dated De- cember 31, 1894, from J. M. Weaver to J. W. Insenhofer, et al.).....		940
Defendant's Exhibit VIII (Deed Dated		

EXHIBITS:

July 23, 1895, from Joseph F. Eddy and Mary J. Eddy to D. J. McCarthy)	942
Defendant's Exhibit IX (Deed Dated May 26, 1908, from J. W. Insenhofer to Wil- low River Land & Irrigation Co.).....	945
Defendant's Exhibit X (Deed Dated April 2, 1903, from Harry A. Duffy to John Shinners and Frances D. Shinners)...	947
Defendant's Exhibit XI (Deed Dated July 23, 1895, from Joseph F. Eddy et ux. to D. J. McCarthy).....	951
Defendant's Exhibit XII (Placer Location Notice Dated October 24, 1894, Signed by Hester C. Cole).....	954
Defendant's Exhibit XIII (Placer Loca- tion Notice Dated December 21, 1895, Signed by Edward Darby, James Cun- ningham and C. M. Foster).....	956
Defendant's Exhibit XIV (Placer Location Notice Dated November 21, 1894, Signed by Thomas J. Eddy).....	957
Defendant's Exhibit XV (Placer Location Notice Dated November 21, 1894, Signed by Joseph F. Eddy, et al.).....	959
Defendant's Exhibit XVI (Water Right Location Notice Dated August 22, 1902, Signed by Emory Cole, et al.).....	961
Defendant's Exhibit XVII (Water Right Location Notice Dated May 29, 1907, Signed by Emory Cole).....	964

Index.	Page
EXHIBITS:	
Defendant's Exhibit XVIII (Placer Location Notice Dated January 28, 1897, Signed by S. P. Johnson, Joseph Hartle and Lewis Stultz).....	966
Defendant's Exhibit XIX (Placer Location Notice Dated January 22, 1897, Signed by E. B. Butler, L. M. Purcell and O. A. Purcell).....	967
Defendant's Exhibit XX (Deed from Dennis McCarthy to Harvey A. Duffy)...	969
Defendant's Exhibit XXI (Deed Dated October 28, 1897, from Hester C. Cole and Leonard Cole to J. L. Cole).....	972
Defendant's Exhibit XXII (Placer Location Notice Dated October 24, 1894, Signed by Thomas J. Eddy).....	975
Defendant's Exhibit XXIII (Placer Location Notice Dated October 24, 1894, Signed by Mary J. Eddy).....	977
Defendant's Exhibit XXIV (Placer Location Notice Dated November 21, 1894, Signed by G. T. Bond).....	978
Defendant's Exhibit XXV (Placer Location Notice Dated October 6, 1894)....	980
Defendant's Exhibit XXVI (Placer Location Notice Dated October 6, 1894, Signed by Leonard Cole).....	981
Defendant's Exhibit XXVII (Placer Location Notice Dated September 10, 1894,	

EXHIBITS:

Signed by F. M. Carter, W. C. Shreves and D. W. Lambert).....	983
Defendant's Exhibit XXVIII (Deed Dated April 2, 1908, from D. M. Brogan to Willow River Land & Irrigation Co.)..	984
Defendant's Exhibit XXIX (Deed Dated April 16, 1897, from L. P. Johnson et al. to Leonard Cole, et al.).....	987
Defendant's Exhibit XXX (Deed Dated February 28, 1895, from J. L. Cole et ux. to J. W. Insenhofer et al.).....	989
Defendant's Exhibit XXXI (Deed Dated April 2, 1896, from G. T. Bond to D. J. McCarthy et al.).....	992
Defendant's Exhibit XXXII (Deed Dated April 18, 1895, from Thos. J. Eddy et ux. to J. W. Insenhofer et al.).....	994
Defendant's Exhibit XXXIII (Deed Dated April 2, 1908, from D. M. Brogan to Willow River Land & Irrigation Co.)	996
Defendant's Exhibit XXXIV (Water Right Location Notice Dated March 14, 1908, Signed by D. M. Brogan).....	998
Defendant's Exhibit XXXV (Water Right Location Notice Dated March 15, 1908, Signed by D. M. Brogan).....	1000
Defendant's Exhibit XXXVI (Water Right Location Notice Dated October 6, 1894, Signed by Hattie C. Cole, Joseph F. Eddy and J. W. Insenhofer)	1002

	Index.	Page
EXHIBITS:		
Defendant's Exhibit XXXVII (Water Right Location Notice Signed by Hattie C. Cole, Joseph F. Eddy and J. W. Insenhofer).....		1003
Defendant's Exhibit XXXVIII (Water Right Location Notice Dated October 6, 1894, Signed by Hester C. Cole, Joseph F. Eddy and J. W. Insenhofer)		1004
Defendant's Exhibit XXXIX (Water Right Location Notice Dated April 7, 1908, Signed by Willow River Land & Irrigation Co., per D. M. Brogan)....		1005
Defendant's Exhibit XL (Water Right Location Notice Dated April 7, 1908, Signed by Willow River Land & Irrigation Co., per D. M. Brogan).....		1012
Defendant's Exhibit XLI (Water Right Location Notice Dated May 29, 1907, Signed by Emory Cole).....		1014
Defendant's Exhibit XLII (Water Right Location Notice Dated April 7, 1908, Signed by Willow River Land & Irrigation Co., per D. M. Brogan).....		1018
Defendant's Exhibit XLIII (Water Right Location Notice Dated April 7, 1908, Signed by Willow River Land & Irrigation Co., per D. M. Brogan).....		1023
Defendant's Exhibit XLIV (Map of Preliminary Survey Showing General Route of "Mountain Side Canal")...		1059

EXHIBITS:

Plaintiff's Exhibit (Certified Copy of Patent No. 8.).....	1037
Plaintiff's Exhibit No. 1 for Identification (Map Showing Location of Willow River Land and Irrigation Company's Reservoir Dam Site and also E. O. L. Company's Lands).....	1027
Plaintiff's Exhibit No. 2 (Map Showing Reservoir Under Construction by The Willow River Land and Irrigation Company)....	1028
Plaintiff's Exhibit No. 3 (Diagram).....	1029
Plaintiff's Exhibit No. 4 (Diagram).....	1030
Plaintiff's Exhibit No. 5 (Diagram).....	1031
Plaintiff's Exhibit No. 6 (Diagram).....	1032
Plaintiff's Exhibit No. 7 (Diagram).....	1033
Plaintiff's Exhibit No. 8 (Diagram).....	1034
Plaintiff's Exhibit No. 9 (Diagram).....	1035
Plaintiff's Exhibit No. 10 (Diagram).....	1036
Names and Addresses of Attorneys of Record..	1
Objections to Certain Exhibits, Complainants..	39
Opinion.....	50
Order Allowing Appeal.....	1069
Order Dated May 25, 1911, Extending Time Within Which to File Record Thereof and to Docket Cause Thirty Days (Original) ..	1077
Order Dated June 16, 1911, Extending Time Within Which to File Record Thereof and to Docket Cause Thirty Days (Original) ..	1078
Order Dated July 20, 1911, Extending Time to	

Index.	Page
File Record Thereof and to Docket Cause	
Three Days (Original)	1079
Order Dismissing Bill of Complaint	49
Petition for Appeal	1061
Praecipe for Transcript	1073
Replication	37
Special Examiner's Certificate to Testimony and	
Exhibits	1026
Stipulation for Omission of Two Packages of	
Letters from Transcript, etc.	1074
Testimony and Exhibits, Transcript of	56
TESTIMONY ON BEHALF OF COM- PLAINANT:	
BOSWELL, W. S. (in Rebuttal)	896
Cross-examination	905
Redirect Examination	910
Recross-examination	911
CLAGETT, THOMAS W.	57
CLAGETT, THOMAS W. (Recalled)	242
Cross-examination	252
Redirect Examination	392
Recross-examination	411
Re-redirect Examination	435
CLAGETT, THOMAS W. (Recalled in Re-	
buttal)	912
Cross-examination	915
Redirect Examination	916
EDWARDS, J. S.	222
Cross-examination	227
Redirect Examination	231

	Index.	Page
TESTIMONY ON BEHALF OF COM- PLAINANT—Continued:		
Recross-examination		232
Re-redirect Examination		233
FAULKNER, LAWRENCE		125
Cross-examination		128
Redirect Examination		143
Recross-examination		147
Re-redirect Examination		147
Re-recross-examination		148
HARRIS, W. P.		198
Cross-examination		202
Redirect Examination		211
Recross-examination		217
Re-redirect Examination		220
Re-recross-examination		221
HOPE, I. W.		188
Cross-examination		190
Redirect Examination		196
Recross-examination		197
Re-redirect Examination		197
JOHNSON, JOHN E.		148
Cross-examination		163
Redirect Examination		183
Recross-examination		184
Re-redirect Examination		186
Re-recross-examination		187
JOHNSON, JOHN E. (Recalled in Re- buttal)		864
Cross-examination		868
Redirect Examination		881

	Index.	Page
TESTIMONY ON BEHALF OF COM- PLAINANT—Continued:		
MARTIN, WALTER S. (in Rebuttal)		885
Cross-examination		888
Redirect Examination		895
NORWOOD, JOHN		74
Cross-examination		81
Redirect Examination		95
Recross-examination		97
Re-redirect Examination		99
Re-recross-examination		99
Re-re-redirect Examination		100
Re-re-recross-examination		100
O'NEIL, F.		234
Cross-examination		236
SCOTT, W. J.		100
Cross-examination		107
Redirect Examination		115
Recross-examination		117
Re-redirect Examination		117
Re-recross-examination		118
Re-re-redirect Examination		119
Re-re-recross-examination		121
Re-re-re-redirect Examination		123
Re-re-re-recross-examination		124
WEAVER, J. F. (in Rebuttal)		882
Cross-examination		884
TESTIMONY ON BEHALF OF DEFEND- ANT:		
ANDERS, C. W.		581
Cross-examination		585

	Index.	Page
TESTIMONY ON BEHALF OF DEFEND-		
ANT—Continued:		
CLAGETT, THOMAS W.		436
CLAGETT, THOMAS W. (Recalled)....		816
Cross-examination		816
Redirect Examination		847
Recross-examination		851
COLE, EMORY		692
Cross-examination		709
Redirect Examination		731
Recross-examination		738
Re-redirect Examination		739
Re-recross-examination.		746
COLE, LEONARD		749
Cross-examination		782
Redirect Examination		807
COLE, LEONARD (Recalled).....		815
Cross-examination		815
Re-redirect Examination		816
DERRICK, A. A.		543
Cross-examination		561
Redirect Examination		577
Recross-examination		579
Re-redirect Examination		580
FOSTER, C. M.		443
Cross-examination		473
Redirect Examination		487
Recross-examination		488
INSENHOFER, JOHN W.		651
Cross-examination		656
KELLY, M. D.		615

	Index.	Page
TESTIMONY ON BEHALF OF DEFEND-		
ANT—Continued:		
	Cross-examination	630
	Redirect Examination	645
	Recross-examination	650
LOCKETT, R. A.		668
	Cross-examination	677
	Redirect Examination	685
	Recross-examination.....	686
	Re-redirect Examination	688
	Re-recross-examination.....	689
MOUDY, JAMES O.		489
	Cross-examination	511
	Redirect Examination	532
	Recross-examination.....	536
	Re-redirect Examination.....	538
	Re-recross-examination.....	540
	Re-re-redirect Examination	542
THOMPSON, JOHN		594
	Cross-examination....	597
	Redirect Examination.....	598
WOOD, ROBERT		599
	Cross-examination....	608
Transcript of Testimony and Exhibits.....		56

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

EASTERN OREGON LAND COMPANY,
Appellant,

vs.

WILLOW RIVER LAND AND IRRIGATION
COMPANY,

Appellee.

Names and Addresses of the Attorneys of Record.

J. N. TEAL, WIRT MINOR, A. B. WINFREE, and
W. A. JOHNSON, Spalding Building, Portland,
Oregon, and B. S. HUNTINGTON, Lewis Build-
ing, Portland,

For Appellant.

LIONEL R. WEBSTER, Beck Building, Portland,
Oregon, JOHN B. HART, Seattle, Washington,
WILLIAM K. LOWREY, Vale, Oregon, and
RICHARDS & HAGA, Boise, Idaho,

For Appellee.

Citation on Appeal [Original].

United States of America,
District of Oregon,—ss.

To The Willow River Land and Irrigation Company,
a Corporation, Greeting:

Whereas, Eastern Oregon Land Company, a cor-
poration, has lately appealed to the United States
Circuit Court of Appeals for the Ninth Circuit from
a decree rendered in the Circuit Court of the United

States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 25th day of April, in the year of our Lord, one thousand, nine hundred and eleven.

R. S. BEAN,

Judge. [1*]

State of Oregon,
County of Multnomah.

I hereby acknowledge due and legal service of the within Citation upon me at Portland, Oregon, this 26th day of April, 1911.

LIONEL R. WEBSTER,
Of Solicitors for Complainant.

[Endorsed]: No. ——. United States Circuit Court, District of Oregon. The Willow River Land and Irrigation Co. vs. Eastern Oregon Land Co. Citation on Appeal. Filed April 26, 1911. G. H. Marsh, Clerk. By _____, Deputy Clerk.

* Page-number appearing at foot of page of original certified Record.

In the Circuit Court of the United States for the District of Oregon.

October Term, 1908.

Be it remembered, that on the 21st day of January, 1909, there was duly filed in the Circuit Court of the United States for the District of Oregon, an Amended Bill of Complaint, in words and figures as follows, to wit: [2]

[Amended Bill of Complaint.]

In the Circuit Court of the United States for the District of Oregon.

EASTERN OREGON LAND COMPANY (a Corporation),

Complainant,

vs.

WILLOW RIVER LAND & IRRIGATION COMPANY (a Corporation),

Defendant.

To the Judges of the Circuit Court of the United States for the District of Oregon, in Equity, Sitting at Portland, in said District.

The Eastern Oregon Land Company, a corporation, incorporated and organized under the laws of the State of California, and having its principal office in the City and County of San Francisco, California, and being a citizen of the State of California, brings this its amended bill against the Willow River Land and Irrigation Company, a corporation, incorporated and organized under and by virtue of the laws of

the State of Oregon, and having its office and principal place of business at Vale, Malheur County, Oregon, and being a citizen of said District, filed by leave of Court first obtained. And thereupon your orator complains and says:

I.

That at and during all of the times hereinafter mentioned the said Eastern Oregon Land Company was a corporation duly incorporated and organized under and by virtue of the laws of the State of California, having its principal office and place of business in the City and County of San Francisco, California, and was and is a citizen [3] of and domiciled in the State of California; that your orator has heretofore filed in the office of the Secretary of the State of the State of Oregon its power of attorney irrevocable, appointing a person who is a citizen of the United States and a resident and citizen of the State of Oregon as attorney in fact for it, and also a certified copy of its articles of incorporation and a written declaration of its desire to engage in business within said State of Oregon, and has paid to such Secretary of State all fees required by law to be paid by a foreign corporation, and has received from said Secretary of State a certificate of its compliance with the laws of the State of Oregon, and that it has furnished to such Secretary of State satisfactory evidence of its legal existence, and its authority under the law of its domicile to engage in the business stated in its declaration, and is now entitled to do business in the State of Oregon as a foreign corporation. That at and during all the times hereinafter

named since the 31st day of March, 1908, the defendant was and is a corporation incorporated and organized under and by virtue of the laws of the State of Oregon, having its principal office at Vale, Malheur County, Oregon, and was and is a citizen of and domiciled in the said State of Oregon.

II.

And your orator further shows that at and during all the times hereinafter named it was and now is the owner in fee simple of all of Section 27, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 21, Township 14 South, Range 42 East, W. M., which lands are situated in Malheur County, Oregon, within said district.

III.

Your orator further shows unto the Court that Willow Creek is a small perennial, non-navigable stream flowing in a generally Southeasterly direction from its source in Townships 14 South, Ranges [4] 38 and 39 East, W. M., and empties into Malheur River at a point in Township 18 South, Range 45 East, W. M., and flows through the lands hereinbefore described and belonging to and owned by your orator in fee simple, and also through a large amount of lands situated in Malheur County, Oregon, more particularly described as follows: All of Sections 3 and 11 in Townships 15 South, Range 42 East, the N. $\frac{1}{2}$, the SE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 31, Township 15 South, Range 43 East, the N. $\frac{1}{2}$ and the SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 5, the NW. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Section 9, the S. $\frac{1}{2}$,

the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Section 23, and all of Section 25, in Township 16 South, Range 43 East, W. M. The W. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of Section 31, Township 16 South, Range 44 East, W. M. The W. $\frac{1}{2}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Section 5, all of Section 9, all of Section 15, the W. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of Section 23, all of Section 25 in Township 17 South, Range 44 East; which lands aggregate 7,120 acres, all of which lands are riparian to said Willow Creek; that complainant is the owner in fee simple of all such lands and it and its predecessors in interest have been the owners of all said lands ever since the year 1867; that about 3,600 acres of said lands are located in the lower level of the Willow Creek Valley and are subject to annual overflow from the waters of said Willow Creek, and capable of irrigation from the waters naturally flowing in Willow Creek during the period when the channel of Willow Creek opposite said lands is capable of carrying all of the water of said creek. That said Willow Creek from the point where it enters Section 21, Township 14 South, Range 42 East hereinbefore described down to a point near the Northwest corner of Section 14, Township 15 South, Range 42 East, runs in a narrow canyon, the sides of which are abrupt and in places almost perpendicular; that at said last-named point the canyon opens out into a wide valley extending in a southeasterly [5] direction about 30 miles to the junction of said creek with Malheur River; that said valley is nearly level from the banks of said creek for a width of from a few rods to three-

fourths of a mile and has an elevation practically the same as the banks of the creek, which lower level is usually called the "bottom"; that in portions of the valley the land, from what is called the bottom, slopes on each side gradually toward higher benches and hills, which benches and hills are entirely arid lands, and in other portions of the valley the bottom is bounded on each side by abrupt or nearly abrupt benches. That the channel of said Willow Creek below the point where it merges from the canyon into the valley to the point where it empties into Malheur River has not a sufficient capacity to carry the waters flowing from the canyon into the valley during a portion of the year, to wit, from about the 1st of February until about the first of May, and during said period the waters overflow the banks of said creek in said valley covering the lands *and* hereinbefore described called the bottom lands; that by reason of such overflowing said bottom lands and the lands immediately adjacent thereto become saturated and subirrigated, and are thereby rendered productive of hay and other crops; that by reason of such saturation the flow of water in the channel of Willow Creek through said valley is naturally maintained and continued during a large portion of the summer months; that without such saturation the channel of said creek through said valley during the months of July, August and September would be nearly, if not quite, without water.

IV.

And your orator further shows that heretofore, to wit, on the — day of April, 1908, the said Willow

River Land & Irrigation Company, defendant, without authority or consent from your orator wrongfully and unlawfully entered upon the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said [6] Section 27, Township 14 South, Range 42 East, W. M., and wrongfully and unlawfully began the construction of a water dam across the channel of Willow Creek, and has ever since continued and is now continuing to excavate, dig, blast and otherwise change the surface of the ground at the point where said dam is being constructed, and has taken and is now taking from the lands of your orator without its consent large quantities of stone and earth to be used and which is being used in the construction of said dam; that said defendant is planning, purposing and threatening to build said dam so that the same will be about 337 $\frac{1}{2}$ yards in length and 100 feet in height; that said dam is situated near the northwest corner of the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said Section 27; that in the construction of said dam the defendant is intending and threatening to and will, unless restrained by this Court, use in the construction thereof about 230,000 cubic yards of rock and earth, a large portion of which it will take from the said lands of your orator, all to the great and irreparable damage of your orator.

V.

And your orator further shows that it is the purpose of the defendant and that it is threatening to and will, unless restrained by an order of this Court, complete said dam for the purpose of obstructing the flow of water in the natural channel of Willow Creek, and to create a large reservoir for the storage and

retention of waters flowing in said Willow Creek above said dam and by means of said dam is intending to and will unless restrained by the order of this Court flood and overflow a portion of said W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Section 2, and all of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Section 21, to the great and irreparable damage of your orator.

VI.

And your orator further shows unto the Court that the lands [7] occupied and to be occupied by said proposed dam and by the reservoir thereby created is of large value, to wit, of the value of \$4,000.00.

VII.

And your orator further shows unto the Court that it is the purpose and intention of the defendant, and the defendant is now threatening to and will, unless restrained by an order of this Court, obstruct, interfere with and prevent the flow of water in the channel of Willow Creek past and below said dam hereinbefore mentioned, and will, unless restrained by an order of this Court, divert and remove the same entirely from the channel of Willow Creek, and thereby prevent the same from flowing into the channel of Willow Creek through and past the said lands of this complainant, situated along Willow Creek between said dam and the junction of said Willow Creek with Malheur River, to wit, 3,600 acres of land owned by your orator as aforesaid, and which are riparian lands upon and along said Willow Creek, and will thereby deprive your orator of the right to the use of the waters of said Willow Creek

flowing as aforesaid through its said riparian lands, and will thereby greatly injure and depreciate the value of all said 7,120 acres to the irreparable damage of your orator.

VIII.

And your orator further shows that the purpose of said defendant in the construction of said dam and the consequent maintenance of the reservoir of said dam is to take and divert the waters of Willow Creek from its natural channel and by means of ditches to convey the same to its own lands and to the lands of other people which lands are not riparian upon Willow Creek, to wit, to lands owned by persons who have no lawful or other right to the use of any of the waters flowing in the channel of said Willow Creek, and that by reason of said diversion and appropriation of the waters of said Willow Creek by defendant your orator will be irreparably [8] damaged, and the damage thereby sustained by your orator will be largely in excess of \$20,000, and your orator has no means of measuring or determining the actual damages which it will sustain by reason of such obstruction, diversion and appropriation of the waters of Willow Creek as aforesaid by the defendant.

IX.

That your orator has no plain, adequate or speedy remedy at law.

X.

Your orator further alleges and shows that this is a suit between citizens of different states, and that the amounts in controversy herein exceed the sum of

\$2,000.00, exclusive of interest and costs.

WHEREFORE, and inasmuch as your orator is without a remedy at law and can only have relief in a court of equity where matters of this nature are properly recognizable it files this its bill of complaint and prays: First, that this Honorable Court grant a decree establishing the right of your orator in and to said lands hereinbefore particularly described upon which said dam is being constructed, and the lands which the defendant proposes to flood and occupy by its proposed reservoir as aforesaid. Second, your orator further prays that a writ of injunction be issued pending this suit according to the course and practice of this Court out of and under the seal of this Honorable Court, directing, commanding, enjoining and restraining the said defendant, its officers, agents, employees and all persons acting under or through either of them from further proceeding with the construction of said dam and from flooding or occupying any of the lands heretofore occupied or to be occupied by said dam and reservoir, and from obstructing or interfering with the natural flow of water in the channel of said Willow Creek, and from appropriating, diverting or taking from the channel of said Willow Creek or from said proposed reservoir any [9] portions of the waters naturally flowing in the channel of Willow Creek. Third, your orator further prays that the defendant be commanded by such decree to remove all structures placed by it upon said lands of the complainant, and particularly all materials placed in said dam, and to restore the lands of your orator to the condi-

tion in which the same were when the defendant wrongfully entered thereon as aforesaid. Fourth, and if your orator has not prayed for the proper relief then and in that event it asks that the Court will grant it such other and further relief as will be proper and just under all the circumstances of the case. Fifth, may it please your Honors to grant unto your orator a writ of subpoena directed to said defendant, the Willow River Land & Irrigation Company, commanding it under a penalty therein to be stated to personally appear before this Court then and there to answer this bill of complaint (but not under oath, answer under oath being hereby expressly waived), and to perform and abide by such order and decree as to your Honors may seem meet in the premises.

EASTERN OREGON LAND CO.,

Complainant.

HUNTINGTON & WILSON,

Solicitors for Complainant.

State of Oregon,

County of Wasco,—ss.

I, Thomas W. Claggett, being first duly sworn, say on my oath that I am local agent of complainant above named, and that the foregoing amended bill of complaint is true as I verily believe.

[Seal]

THOMAS W. CLAGETT.

Subscribed and sworn to before me this 21st day of January, A. D. 1909.

[Seal]

J. BAIKIE,

Notary Public for the State of Oregon.

Amended Bill of Complaint. Filed Jan. 21, 1909.
G. H. Marsh, Clerk. [10]

And afterwards, to wit, on the 7th day of April, 1909,
there was duly filed in said court, an Answer,
in words and figures as follows, to wit: [11]

[Answer.]

*In the Circuit Court of the United States for the
District of Oregon.*

EASTERN OREGON LAND COMPANY (a Cor-
poration),

Complainant,

vs.

WILLOW RIVER LAND AND IRRIGATION
COMPANY (a Corporation),

Defendant.

The defendant, Willow River Land & Irrigation
Company, answering the bill of complaint filed herein
by the complainant, Eastern Oregon Land Company,
admits, denies and alleges, as follows, to wit:

I.

The defendant admits that the complainant is a
corporation incorporated and organized under the
laws of the State of California, and having its prin-
cipal office in the city of San Francisco, California,
and that it is a citizen of said State, that it has here-
tofore filed in the office of the Secretary of State for
the State of Oregon its power of attorney appoint-
ing a person who is a citizen of the United States
and a resident and citizen of the State of Oregon
as its attorney in fact for it, that it has paid to the

Secretary of State the fee required by law to be paid by a foreign corporation, has received from the Secretary of State a certificate of compliance with the laws of the State of Oregon, that it has furnished to said Secretary of State evidence of its legal existence and it has authority under the laws of the State of California to engage in the business [12] stated in its declaration, and that it is now entitled to do business in the State of Oregon as a foreign corporation. The defendant admits that at all times mentioned in the bill of complaint since the 31st day of March, 1908, the defendant was and now is a corporation incorporated and organized under and by virtue of the laws of the State of Oregon, and that it has its principal office at Vale, Malheur County, Oregon, and was and is a citizen of, and domiciled in, said State.

II.

The defendant denies that at or during all or any of the times mentioned in said bill of complaint the complainant was, or now is the owner in fee simple, or otherwise, or at all, of all of section 27 and the south one-half of the southwest one-quarter ($\frac{1}{4}$) and the southwest quarter of the southeast quarter of section 21, township 14 south, range 42 east, Willamette Meridian, or of any of said lands, but admits that all of the said lands are situated in Malheur County, Oregon.

III.

The defendant admits that Willow Creek is a perennial non-navigable stream flowing in a southeasterly direction from its source in township 14

south, ranges 38 and 39 east, Willamette Meridian, into the Malheur River at a point in township 18 south, range 45 east, Willamette Meridian, and admits that during the summer and autumn of each year said stream is a small stream, but alleges that in the late winter and early spring in ordinary years said stream for a short time carries a large volume of water which, however, is carried by said stream at a time when it is not and cannot be used as it flows or by the ordinary means of irrigation, but can be used only by means of a system of storage in reservoirs, such as that proposed and contemplated by this defendant as hereinafter [13] more particularly alleged.

The defendant admits that said Willow Creek flows through the lands described in paragraph two of said bill of complaint and in paragraph II of this answer; but denies that said lands, or any part thereof, now do, or ever did belong to or were owned by the complainant herein in fee simple or otherwise or at all.

The defendant admits that said Willow Creek flows through part of sections 3 and 11, township 15 south, range 42 east, Willamette Meridian, and through the north $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 31, township 15 south, range 43 east, W. M., and denies that said creek flows through any other part of said section 31.

The defendant admits that said Willow Creek flows through or onto the north half and the SE. $\frac{1}{4}$ of section 5, township 16 south, range 43 east Willamette Meridian, and denies that said creek flows

through or onto the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section.

The defendant denies that said creek flows through or onto the NW. $\frac{1}{4}$ or the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 9, township and range aforesaid.

Admits that said creek flows across the south half of the NE. $\frac{1}{4}$ of section 23 in said township and range, and denies that it flows onto or across the south half of said section or the south half of the NW. $\frac{1}{4}$ or the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ thereof. Admits that said creek flows across the N. $\frac{1}{2}$ of section 25 in said township and range, and denies that it flows across any other part of said section.

The defendant denies that said Willow Creek flows across the W. $\frac{1}{2}$ or the SE. $\frac{1}{4}$ of section 31, township 16 south, range 44 east, W. M., and denies that said Willow Creek flows onto or across the west half or the west half of the SE. $\frac{1}{4}$ or the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of [14] section 5, township 17 south, range 44 east, Willamette Meridian. Admits that said Willow Creek flows through sections 9 and 15 of said township and range. Admits that said creek flows across the west half of section 23 in said township and range, and denies that it flows onto, through or across the SE. $\frac{1}{4}$ of said section. Admits that said creek flows across said section 25 of said township and range.

And in reference to the flow of said creek across the lands as hereinbefore admitted this defendant now alleges the fact to be that said creek flows diagonally across the extreme northeast corner of section three, township 15 south, range 42 east, Wil-

lamette Meridian, and flows but a short distance on said land and through a narrow rocky canyon. That there are no bottom or irrigable lands through which said creek flows, and that the banks or bluffs on each side of said creek rise abruptly therefrom to a height of more than two hundred feet; that it is impossible to use any of the water of said creek on said land for purposes of irrigation thereof or for any other purpose, and that there is no land on said section susceptible of cultivation. That said creek flows directly across the west half of section 11 in said township and range; that it there flows through a rocky canyon with banks or bluffs arising abruptly from each side to a height of more than two hundred feet, and that there is no tillable land whatever along said creek or adjacent thereto, and no water from said creek could possibly be used upon said land or any land adjacent thereto for any purpose whatever. That said creek flows for a short distance across the extreme northeast corner of the north half of the SW. $\frac{1}{4}$ of section 21 in said township and range, that the banks of said creek as it flows across said land are more than 20 feet above normal or ordinary flow of the water in said creek, that it is impossible to use any of the waters [15] of said creek for the irrigation of any of said land and that it never has been and never can be so used. That Willow Creek flows diagonally across the NE. $\frac{1}{4}$ of section 5, township 16 south, range 43 east, Willamette Meridian, onto adjoining lands and then flows back onto the north half of the SE. $\frac{1}{4}$ of said section but only for a very short distance and in such

way as that it cannot be utilized for the irrigation of said land. That said creek flows diagonally across the north half of section 25 in said township and range, and that the banks of said creek as it flows across said land are more than 11 feet above normal or ordinary flow of the water of said creek, and that the waters thereof never have been and cannot be used for the purpose of the irrigation of said land or for any other purpose in connection therewith. That said creek flows diagonally for a short distance across the extreme northeast corner of section 9, township 17, south of range 44 east, Willamette Meridian, and diagonally across the northeast corner of section 15 in said township and range, and only for a very short distance diagonally across the extreme northeast corner of the NW. $\frac{1}{4}$ of section 23 in said township and range, and across section 25 in said township and range, and that said creek cannot be and never has been used for the irrigation of any of said land in said township 17, and has never been used on any of said lands for any purpose whatever.

And defendant denies that the land described in paragraph III of complainant's bill of complaint, and through which it is alleged said Willow Creek runs, aggregates the amount of 7120 acres or any greater amount that as herein before shown in this paragraph of this answer, and denies that any of said lands are riparian to said creek except as herein above shown. And the defendant admits that the complainant is the owner in fee simple of all of the lands hereinabove described in this paragraph and in paragraph three of the Bill of Complaint, and

denies that it became such owner in the [16] year 1867, and alleges that it has no knowledge or information sufficient to form a belief as to when said complainant became such owner of said lands. The defendant alleges that the allegation in the bill of complaint to the effect that 3,600 acres of the lands described in the bill of complaint are located in the lower level of the Willow Creek Valley are so vague, uncertain and indefinite as that this defendant can neither admit or deny respecting the same, and the defendant alleges that none of the said lands are capable of irrigation from the waters naturally flowing in Willow Creek at any time save and except as herein above shown.

The defendant admits that said Willow Creek from a point where it enters section 21, township 14 south, range 42 east, down to a point near the northwest corner of section 14, township 14 south, range 42 east, runs in a narrow canyon, the sides of which are abrupt and almost perpendicular and that at said last-named point the canyon opens out into a valley extending in a southeasterly direction to the junction of said creek with Malheur River; but the defendant denies that said valley is nearly level from the banks of said creek for a width of from a few rods to three-quarters of a mile or that it has an elevation practically the same as the banks of the creek.

And the defendant alleges that the said creek flows through and across the various tracts of land described in complainant's bill of complaint, as hereinabove particularly alleged and set forth, and admit

that in portions of the valley the land slopes on each side from the lower land adjacent to the creek gradually toward higher benches and hills, and that these benches and hills are arid lands and that in other portions of the valley the bottom is bounded on each side by abrupt or nearly abrupt benches, but alleges that these conditions have no bearing upon or reference to [17] any of the lands described in the bill of complaint, except only as hereinabove more particularly shown.

The defendant admits that the channel of Willow Creek is not sufficient to carry all of the waters naturally flowing therein at all seasons of the year, and alleges that usually during the later winter or early spring and at what is commonly known as the floor season a large quantity of water flows down said creek during the short periods of time greatly in excess of the capacity of the channel thereof. The defendant denies that from about the 1st of February until about the 1st of May the waters of said creek overflow the banks thereof or cover the lands described in the bill of complaint or called the bottom lands, but alleges that notwithstanding the overflow of said creek even at times of extreme high water a great deal of the lands described in the bill of complaint are not covered or affected by the waters of said creek as hereinabove more particularly alleged. The defendant denies that by reason of any overflow of said creek any lands of the complainants become saturated or subirrigated or are thereby rendered productive of hay or any other crop, and alleges that at the time of such overflow of said creek all the

lands overflowed are usually frozen, and are already completely saturated with water by reason of the rains and melting snow, and that the same natural conditions which cause the overflow of said stream also cause the complete saturation of the soil and of all the land overflowed thereby. The defendant denies that by reason of the saturation of the soil by the overflow water from the channel of Willow Creek the ordinary flow of said creek is maintained or continued or in any way affected during a large or any portion of the summer months, and denies that without such saturation the channel of said creek through said valley during the months of July, August and September is or would be in any way affected. And the defendant alleges that the overflow of the waters of said creek are [18] of no benefit whatever to any of the lands of the complainant, that said water never has been used by said complainant on any of said lands, and that none of said overflow water ever can be utilized for any useful or beneficial purpose whatever on any of the lands of said complainant.

IV.

The defendant admits that on the — day of April, 1908, it entered upon the west half of the southwest quarter of section 27, township 14 south, range 42 east, Willamette Meridian, and began the construction of a dam across the channel of Willow Creek, and that ever since that time it has continued the work of construction of said dam, and in such work has made excavations on said land and thereby changed the surface of the ground at the point where the dam is being constructed; admits that it has taken

and is now taking from said land large quantities of stone and earth to be used and which is being used in the construction of said dam, and admits that all this was done without the express authority or direct consent of said complainant; but denies that it was done wrongfully or unlawfully. Denies that the said land is or ever was the property of the complainant. Defendant admits that it proposes to construct said dam of practically the dimensions in the bill of complain set forth, viz.: About 337 yards long and about 100 feet high, and that the dam is situated near the northwest corner of the southwest quarter of the southwest quarter of section 27, and admits that in the construction of the dam, the defendant intends to and will use a large amount of rock and earth, the exact amount of which the defendant is unable to say, and that it will take a large portion thereof from said land, but denies that the construction of said dam or the excavation of the earth, or the use of the rock or earth will be of great or irreparable, or any damage whatever to the complainant.

[19]

V.

The defendant admits that it is its purpose in the construction of said dam to complete the same for the purpose of obstructing the flow of a part of the water in the natural channel of Willow Creek, viz: The surplus or flood water thereof, and to create a large reservoir for the storage and retention of said water, and that by the retention of said water in said reservoir, it will overflow and flood a small portion of the west half of the southwest quarter of section

27, and a small portion of the south half of the southwest quarter, and the southwest quarter of the southeast quarter of section 21, but denies that the construction and maintenance of said dam, or the overflow of said land will greatly or irreparably damage complainant or will cause it any damage whatever, and the defendant alleges that not to exceed fifty acres of said lands will be affected in any way by the construction or maintenance of said dam and reservoir.

VI.

The defendant denies that the lands occupied, or to be occupied, by said proposed dam and by the reservoir thereby created are of the value of \$4,000.00, or of any greater value than \$100.00.

VII.

The defendant denies that it is threatening to, or will unless restrained by an order of this Court, obstruct or interfere with or prevent the flow of the water in the channel of Willow Creek past and below said dam hereinbefore mentioned, save and except only in such quantities and to such extent as by reason of its rights in the premises and ownership in said water, it may properly and lawfully do, as hereinafter more particularly specifically alleged, and denies that unless restrained by an order of this Court it will divert or remove said water entirely from the channel of Willow Creek, or thereby prevent the same from [20] flowing into the channel of Willow Creek through and past any of the lands of the complainant situated along Willow Creek between said dam and the junction of said creek with

the Malheur River, save and except only as it may so do by reason of its legal rights in and ownership of said water and the use thereof, as herein more fully shown. Denies that the complainant owns 3,600 acres of land which are riparian upon and along said creek, or that it owns any greater amount of said land than as hereinbefore in this answer alleged. Denies that the defendant will by the construction and maintenance of said dam and said reservoir deprive the plaintiff of the right to the use of any of the waters of Willow Creek, or that it will thereby greatly or at all injure or depreciate the value of any land of the complainant to its irreparable, or other injury. And denies that the complainant has any right to the use of any of the waters of Willow Creek for any purpose.

VIII.

The defendant admits that it is its purpose in the construction of said dam and the maintenance thereof and of the reservoir created thereby to divert certain of the waters of Willow Creek from its natural channel and by means of ditches, to convey the same to its own lands and to the lands of other people, a part of which said lands are riparian to Willow Creek and a part of the same are not. And denies that its purpose is to use said water except only as it may do so lawfully and of right, or upon any lands upon which said water may not be lawfully used. And defendant alleges that its purpose in the construction and maintenance of said dam and said reservoir is to collect and impound in said reservoir the flood or surplus water of said creek, which

as it naturally flows is of no use whatever to said complainant, or to any other person, and to use said water so collected and impounded [21] in the proper and necessary irrigation of adjacent arid land belonging to itself and to other parties. And the defendant alleges that it is not, and never has been, its purpose or intention in the construction or maintenance of said dam and said reservoir, and the collection and impounding and use of said water, to so obstruct or interfere with the natural flow of the water of said creek as to interfere in any way with the rights of any person in or to the use of any of the waters of said stream, and it alleges that its proposed system of irrigation by means of said dam and said reservoir can and will be carried out without injury or damage to the complainant or to any other person. And the defendant denies that by the construction and maintenance of said dam and reservoir, and the completion and the carrying out of the system of irrigation of the defendant as aforesaid the complainant will be irreparably damaged or damaged at all, or that the damage sustained by the complainant will be largely in excess of \$20,000.00 or will amount to anything whatever.

IX.

And further answering said bill of complaint and in connection with the denials hereinbefore made of that part of the allegation of the bill of complaint wherein it is alleged that the complainant is the owner in fee simple of all of section 27, and the south half of the southwest quarter of the southwest quarter of the southeast quarter of section 21, town-

ship 14, range 42 east of the Willamette Meridian, this defendant now alleges that said land and particularly that part thereof occupied by said dam and to be occupied by its reservoir, as in said bill of complaint and hereinabove shown, is mining land, the same being more valuable for its gold deposits than for any other purpose, and that it is and always has been absolutely valueless for any other purpose, except that of mining for gold. That more than thirty years ago said land was [22] filed upon as placer gold mining claims, by the predecessors in interest of this defendant under and pursuant to the laws of the United States governing the acquiring of placer gold mining claims, and that those who so filed upon said claims were competent and qualified so to make said filings under said laws; that said persons who so filed upon said land as such mining claims held, worked and occupied the same as said mining claims and that by proper mesne conveyances from said parties, said land has been conveyed to this defendant and it is now the owner thereof. And the defendant alleges that it and its predecessors in interest for more than thirty years have been in the open, notorious, adverse and undisputed occupancy and possession of said premises, under claim and color of right, and during all of said time, have held and occupied said lands under claim and color of right adversely to the said complainant and to all the world, and that said defendant is now the lawful owner and occupant thereof.

X.

Further answering said complaint, this defendant alleges that its predecessors in interest in said mining claims as hereinabove set forth, at the time they filed on said claims and for the purpose of working the same, as placer gold mine claims, filed on, appropriated and used all of the waters of Willow Creek naturally flowing through said lands during the summer and autumn seasons, and used that quantity of water of said stream during the entire year in and about the working of said claims. That said appropriation of water so made as aforesaid was made under and pursuant to the statutes of the United States authorizing and permitting the appropriation of water for the purpose of mining, agriculture and other useful purposes. That through various sales, transfers and conveyances of said water rights, the same have been sold, transferred and conveyed to this defendant and the defendant is now the legal [23] owner and holder thereof and is the owner of all of said water rights. And the defendant alleges that various other parties have at different times duly and regularly made various appropriations of the water of Willow Creek for agricultural purposes below the point at which defendant's dam is located, so that now all of the waters flowing in said creek, except only the flood waters thereof, are now all appropriated and used for agricultural and domestic purposes. That during the late winter and early spring of each year, by reason of rains and melting snows in the mountains and hills adjacent to said creek, great quan-

tities of water for a short time flow in and along said creek which flood water is of no use or benefit to the complainant or anyone along said creek, but, on the contrary, is an injury, and this flood water is the only water of said creek not already appropriated and used by this defendant, and by persons other than the complainant, so that the complainant has no right to or interest in any of the waters of said stream which can possibly be used for any purpose whatever. The defendant alleges that as hereinbefore shown and set forth, its only purpose in the construction of said dam and reservoir is to collect and impound said flood water so that the same may be used for the purpose of irrigating adjacent arid and irrigable land.

XI.

Further answering the bill of complaint herein the defendant alleges that it is a corporation duly and regularly incorporated under and pursuant to the laws of the State of Oregon, having for its object, among other things, to build, establish and construct, and when established, to maintain and operate dams and reservoirs, irrigation ditches, channels and flumes, together with laterals running therefrom, for the purpose of irrigating lands, and for the purpose of bringing under cultivation desert and unproductive lands, [24] to operate and construct irrigation system, or systems and the business of furnishing water for irrigation purposes to others under contract of sale, or in any other manner whatsoever, to acquire, build or operate the business of a power company for itself or for furnishing power to others, to obtain by purchase, lease, location

or otherwise, water rights and privileges and irrigation rights and privileges, and to maintain and operate a general system of irrigating lands for itself or for others, and to engage in the general business of developing and cultivating lands and handling the produce therefrom for itself or for others, construct, maintain, improve, control and superintend canals, reservoirs, watercourses, flumes ditches and laterals.

That in furtherance of said purpose, and in pursuance of the statute of this State, this defendant, on the 7th day of April, 1908, duly and regularly posted in conspicuous places at the point of its head-gate of the reservoir situated in the northeast quarter of the southwest quarter of section two, township 15 south, range 42 east, of the Willamette Meridian, a notice of location and appropriation of water from Willow Creek, which said notice was duly and regularly signed by this defendant by and through its President and Secretary, and which is in words and figures as follows, to wit:

“NOTICE OF LOCATION AND APPROPRIATION OF WATER FROM WILLOW RIVER.

NOTICE IS HEREBY GIVEN that the Willow River Land and Irrigation Company has this day located and appropriated twenty thousand (20,000) cubic inches of water by miner's measure, under six inch pressure, of and from Willow Creek and of and from the water flowing therein, or a sufficient amount thereof to maintain a continuous flow of Twenty Thousand (20,000) inches thereof, miner's measure.

The canal conveying the water shall be known as

the Mountainside Canal.

The name of the owners is the Willow River Land and Irrigation Company, a corporation organized and doing business under and by virtue of the laws of the State of Oregon.

There shall be two reservoirs used for storage purposes, in connection with the operation of said canal and of the various laterals therefrom. [25]

The headgate to the upper reservoir to be constructed in the Southwest quarter of the Northwest quarter of section Twenty-seven (27), Township Fourteen (14) South, of Range Forty-two (42) East, of the Willamette Meridian; which said reservoir shall be created by the construction of certain dams and dykes across the channel of Willow River or creek and near the said headgate.

The headgate to the lower reservoir to be constructed in the Northeast quarter of the southwest quarter of Section Two (2), Township fifteen (15) South, of Range Forty-two (42) East, of the Willamette Meridian; which said reservoir shall be created by the construction of certain dams and dykes across the channel of Willow River or Creek and near the said headgate.

The general course and direction of said Mountainside Canal to be from said headgate in a southwestern direction through sections Two (2) and eleven (11), Township Fifteen (15) south, of range forty-two (42) East, of the Willamette Meridian; thence Northwest through sections fourteen (14), fifteen (15), and ten (10), thence southeast through sections fifteen (15), twenty-three (23) and twenty-two (22); thence southwest through sections twenty-two

(22), twenty-seven (27) and thirty-four (34); all in township fifteen (15) south, of range forty-two (42) east of the Willamette Meridian, and continuing in a southwest direction through Sections three (3), ten (10), fifteen (15), and two (2), in township sixteen (16), south of range forty-three (43) east, of the Willamette Meridian.

The size of the canal shall be twelve (12) feet in width in the bottom with sloping sides, of about one and a half to one in earth, and four (4) in depth.

The number of cubic inches appropriated is twenty thousand (20,000) miner's inches; the source of supply of water is Willow Creek and its various branches and tributaries.

The said water is located and appropriated for the purpose of beneficial use and is to be used and applied for the purpose of irrigation and for household and domestic and power purposes and for watering cattle and livestock.

This notice is posted on this 7th day of April, 1908, for and on behalf of said corporation and under its order issued by its board of directors.

Dated and posted this 7th day of April, 1908.

WILLOW RIVER LAND AND IRRIGATION CO.

By D. M. BROGAN,
President.

Attest: EDWARD B. O'DONNELL,
Secretary.

[Corporate Seal of said Corporation.]

Witnesses:

W. NOOT,
LEONARD COLE."

That said notice was thereafter on the — day of April, 1908, duly and regularly filed and recorded in the Clerk's office of Malheur County, Oregon, all in pursuance of the statutes of said State. That on the 7th day of April, 1908, this defendant [26] posted in a conspicuous place, at the headgate of the reservoir, situated in the southwest quarter of the northwest quarter of section 27, township 14 south, of range 42 east, of the Willamette Meridian, a notice of location and appropriation of water from Willow Creek, which said notice was signed by this defendant, through and by its President and Secretary, and which is in words and figures as follows, to wit:

“NOTICE OF LOCATION AND APPROPRIATION OF WATER FROM WILLOW CREEK.

Notice is hereby given that the Willow River Land and Irrigation Company has this day located and appropriated Twenty Thousand (20,000) cubic inches of water by miner's measure, under six inch pressure, of and from Willow Creek and of and from the water flowing therein, or a sufficient amount thereof to maintain a continuous flow of Twenty thousand (20,000) inches thereof, miner's measure.

The canal conveying the water shall be known as the Mountainside Canal.

The name of the owners is the 'Willow Land and Irrigation Company,' a corporation organized and doing business under and by virtue of the laws of the State of Oregon.

There shall be two reservoirs used for storage purposes, in connection with the operation of said canal,

and of the various laterals therefrom.

The headgate to the upper reservoir to be constructed in the southwest quarter of the northwest quarter of section twenty-seven (27), Township fourteen (14) south of range forty-two (42) east of the Willamette Meridian; which said reservoir shall be created by the construction of certain dams and dykes across the channel of Willow River or Creek and near said headgate.

The headgate to the lower reservoir to be constructed in the northeast quarter of the southwest quarter of section two (2), township fifteen (15) south, of range forty-two (42) East of the Willamette Meridian; which said reservoir shall be created by the construction of certain dams and dykes across the channel of Willow River or Creek and near the said headgate.

The general course and direction of said Mountain-side Canal to be from said headgate in a southwestern direction through Sections Two (2) and eleven (11), township fifteen (15) South, of Range Forty-two (42) east of the Willamette Meridian; thence Northwest through Sections fourteen (14), Fifteen (15) and ten (10); thence southwest through sections fifteen (15), twenty-three (23) and twenty-two (22); thence southwest through sections twenty-two (22), twenty-seven (27) and thirty-four (34); all in township fifteen (15) south of range forty-two (42) east of the Willamette Meridian, and continuing in a southwest direction through sections three (3), ten (10), fifteen (15) and two (2), in township sixteen (16) south, of range forty-three (43) East,

of the Willamette Meridian. [27]

The size of the canal shall be twelve (12) feet in width in the bottom, with sloping sides of about one and a half to one in earth and four (4) feet in depth.

The number of cubic inches appropriated is twenty thousand (20,000) miner's inches; the source of supply of water is Willow Creek and its various branches and tributaries. The said water is located and appropriated for the purpose of beneficial use, and is to be used and applied for the purpose of irrigation and for household and domestic and power purposes and for watering cattle and livestock.

This notice is posted on this 7th day of April, 1908, for and on behalf of said corporation and under its order, issued by its Board of Directors.

Dated and posted this 7th day of April, 1908.

WILLOW RIVER LAND AND IRRIGATION COMPANY.

By D. M. BROGAN,
President.

Attest: EDWARD B. O'DONNELL,
Secretary.

[Corporate Seal of said Corporation.]

Witnesses:

W. NOOT,
LEONARD COLE."

And which said notice was duly and regularly filed and entered of record in the Clerk's office of Malheur County, Oregon, under and pursuant to the laws of said State. And defendant alleges that within ten days from the date of posting the notices aforesaid, as hereinbefore alleged, it filed for record

in the office of the Clerk of Malheur County a map showing the general route of the ditches and canals, through and by means of which the water so appropriated under and pursuant to said notice was to be distributed and used, all in compliance with the statute of the State of Oregon. And defendant alleges that in all respects it has fully and completely complied with the statutes of the State of Oregon respecting the appropriation of water for general use and for irrigation. And defendant alleges that in pursuance of said notice in furtherance of the purpose of its organization as hereinabove alleged, and in accordance with the statutes of this State as aforesaid, and on the — day of April, 1908, it began the construction of the dam mentioned in the bill of complaint, and in this, its answer, and has since then [28] diligently proceeded with the work of constructing the said dam, forming its reservoir for the purpose of utilizing for domestic and irrigating purposes, certain of the waters of Willow Creek so appropriated by it as aforesaid, and that its purpose is and ever since the giving of said notice has been, to collect and impound the overflow or flood waters of said creek, and utilize the same for the purpose of irrigating arid lands adjacent thereto as hereinabove alleged, and defendant alleges that at the time it began the construction of said dam, the complainant well knew that it had so begun said work, that said work of the construction of said dam has proceeded since then with the full knowledge of said complainant, and of its agents and representatives. The complainant has maintained an of-

office in the town of Vale some thirty miles distant from where defendant's dam is being constructed, which office has been continually occupied by the agents and representatives of said complainant, who have at all times known of the construction of said dam and of the labor and expense incident thereto. That this defendant has expended in the construction of said dam a large amount of money, to wit: More than \$50,000.00, all of which was at all times well known to said agents and representatives of said complainant. And the defendant alleges that notwithstanding the knowledge of the complainant respecting the construction of said dam, and the expense incurred thereby as aforesaid, no objection whatever has ever been made by said complainant to the construction of said dam, so far as the same might affect the flow of the water in Willow Creek, and that not until the beginning of this suit, and until after a great amount of money has been invested in the construction of said dam, all with the full knowledge of said complainant, as aforesaid, was any legal proceedings whatever begun against this defendant. [29]

And now having fully answered the bill of complaint herein, this defendant asks that the same be dismissed.

JOHN B. HART,
LIONEL R. WEBSTER,
Solicitors for Defendant.

State of Oregon,
County of Wasco,—ss.

Due and legal service of the within Answer is hereby accepted at The Dalles, Oregon, this 5th day of April, 1909, by receiving a copy thereof duly certified to be such by Lionel R. Webster, of attorneys for defendant.

HUNTINGTON & WILSON,
Attorneys for Complainant.

Answer. Filed Apr. 7, 1909. G. H. Marsh, Clerk.

[30]

And afterwards, to wit, on the 1st day of May, 1909, there was duly filed in said court a Replication, in words and figures as follows, to wit: [31]

In the Circuit Court of the United States for the District of Oregon.

EASTERN OREGON LAND COMPANY,
Plaintiff,

vs.

WILLOW RIVER LAND & IRRIGATION COMPANY,
Defendant.

Replication.

This replicant, the Eastern Oregon Land Company, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, the Willow River Land & Irrigation Company, for repli-

cation thereunto saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

HUNTINGTON & WILSON,
Solicitors for Complainant. [32]

State of Oregon,
County of Wasco,—ss.

I, Geo. W. Berrian, being first duly sworn, say on my oath that I am local agent of complainant, above named, and that the foregoing Replication is true, as I verily believe.

GEO. W. BERRIAN.

Subscribed and sworn to before me this 29th day of April, A. D. 1909.

[Seal]

GEORGE MOWRY,

Notary Public for the State of Oregon.

Replication. Filed May 1, 1909. G. H. Marsh,
Clerk. [33]

And afterwards, to wit, on the 6th day of July, 1910, there was duly filed in said court objections to the introduction of certain exhibits, in words and figures as follows, to wit: [34]

[Complainant's Objections to Certain Exhibits.]

*In the Circuit Court of the United States for the
District of Oregon.*

EASTERN OREGON LAND CO.,

Complainant,

vs.

WILLOW RIVER LAND AND IRRIGATION CO.,

Defendant.

At the time of the taking of the testimony in the above-entitled cause, the defendant was not prepared to submit certain exhibits which it desired to offer on its behalf, a list of which exhibits is contained in the transcript following page 852.

It was therefore stipulated that these exhibits should be received in evidence subject to whatever objection complainant might urge against them.

The complainant now submits its objections to these records, and for convenience of Court and counsel makes such objections in writing.

Complainant objects to Defendant's Exhibit III, for the reason that the same is incompetent, irrelevant and immaterial in this:

- (A) The grantors named in said Exhibit III and by whom the same purports to have been executed are not shown by the record or by

the evidence in the case to have had any interest in the property therein described.

- (B) The lands described in said instrument include the South half of the South half of the Northwest quarter of the Southwest quarter, and the North half of the Southwest quarter of the Southwest quarter and the North half of the Southeast quarter of the Southwest quarter and the North [35] half of the Southwest quarter of the Southeast quarter and certain other lands, the description whereof is too vague to enable the reader to determine their location, within Section 21, Township 14 South, Range 42 East, W. M. Said instrument does not convey the Southeast quarter of the Southwest quarter of the Southwest quarter, the South half of the Southeast quarter of the Southwest quarter and the South half of the Southwest quarter of the Southeast quarter of Section 21; the complainant alleges in its bill (Paragraph 5) that defendant is intending to overflow all of the South half of the Southwest quarter and the Southwest quarter of the Southeast quarter of Section 21; the defendant in its answer (Paragraph 5) admits that it will overflow a portion of the South half of the Southwest quarter and the Southwest quarter of the Southeast quarter of Section 21, but does not allege what portion of said legal subdivisions it proposes to flood.
- (C) Said Exhibit III purports to convey the

Northwest quarter of the Northwest quarter of the Southwest quarter and the Southeast quarter of the Northwest quarter of the Southwest quarter and other lands in Section 27, Township 14 South, Range 42 East, which lands are so imperfectly described as that it is impossible to identify the same; but said instrument does not purport to convey the Southwest quarter of the Northwest quarter of the Southwest quarter of Sec. 27, the tract upon which the defendant proposes to and has commenced constructing its dam complained of in the bill.

- (D) Said instrument does not purport to have been sealed by any of the grantors.
- (E) Said instrument purports to have been signed by H. C. Cole by Leonard Cole, attorney in fact, but no power of attorney is offered in evidence showing authority to [36] Leonard Cole to execute the same.

Complainant objects to Defendant's Exhibit IV upon the ground that the same is incompetent, irrelevant and immaterial in this:

- (a) That said instrument does not describe the land in Section 27 upon which defendant is constructing the dam complained of in the bill.
- (b) Said exhibit is not shown to have been posted.
- (c) Said Exhibit was never filed in the United States Land Office in the district in which said lands are located or in any land office.
- (d) Prior to the date of said notice and prior

to the date of its recording all of Section 27, Township 14 South, Range 42 East, had been conveyed by the United States to complainant.

Complainant objects to Defendant's Exhibit V, for the reason that the same is immaterial, irrelevant and incompetent in this:

- (a) That the same does not describe any property mentioned in the bill of complainant or any property at all; that whatever description is contained in said exhibit is too indefinite to enable one to locate the alleged claim.
- (b) At the date of said instrument the United States had conveyed the lands described in the bill of complainant as belonging to the complainant, to the complainant's predecessor.
- (c) There is nothing to show that said instrument was ever posted on any claim.
- (d) Said exhibit purports to be a certified copy of a certified copy.
- (e) Said exhibit does not appear to have been filed for record in the land office of the district in which the lands described in the complaint are located or in any land office.

Complainant objects to Defendant's Exhibit VI upon the ground [37] that the same is incompetent, irrelevant and immaterial in this:

- (a) There is nothing to show that the grantors named in said instrument ever had any inter-

est in the property therein described, and said exhibit does not convey or purport to convey the lands described in the bill of complaint.

- (b) That on the date of said instrument the title to all of the lands described in the bill of complaint as belonging to complainant were vested in the complaint.

Complainant objects to Defendant's Exhibit VII for the same reasons, and makes the same objections as to Exhibit VI.

Complainant objects to Defendant's Exhibit VIII for the same reason and urges the same objections as to Exhibit VI.

Complainant objects to the Defendant's Exhibit IX for the same reasons and urges the same objections as to Exhibit VI.

Complainant objects to Defendant's Exhibit X; for the same reasons urges the same objections as to Defendant's Exhibit VI.

Complainant objects to Defendant's Exhibit XI for the same reasons and urges the same objections as to Defendant's Exhibit VI.

Complainant objects to Defendant's Exhibit XII as incompetent, irrelevant and immaterial in this:

- (a) The description of the alleged location therein referred to is indefinite, and said alleged location could not thereby be identified.
- (b) There is nothing to show that said notice was ever posted upon the land or any land.
- (c) There is nothing to show that said notice was ever filed in the United States Land Office of

the district in which the lands described are located.

- (d) At the date of said exhibit the title to the lands described in the bill of complainant as belonging to complainant [38] were vested in the complainant.

Complainant objects to Defendant's Exhibit XIII for the same reasons and urges the same objections as to Defendant's Exhibit XII.

Complainant objects to Defendant's Exhibit XIV for the same reasons and urges the same objections as to Defendant's Exhibit XII.

Complainant objects to Defendant's Exhibit XV for the same reasons and urges the same objections as to Defendant's Exhibit XII.

Complainant objects to Defendant's Exhibit XVI for the reason that the same is incompetent, irrelevant and immaterial in this:

- (a) That said alleged notice does not conform to the requirements of the laws of Oregon in force at the date thereof, and does not specify the name of the ditch therein referred to nor the point at which its headgate is proposed to be constructed nor the point of diversion nor the description of the course of said ditch nor the size or dimensions of the same in width or depth nor the number of cubic inches of water intended to be appropriated nor the number of reservoirs, if any.
- (b) That there is nothing that shows that said notice was ever posted anywhere.
- (c) That there is nothing in said notice or in the

record to show from what creek the water is sought to be taken.

Complainant objects to Defendant's Exhibit XVII as immaterial, irrelevant and incompetent.

Complainant objects to Defendant's Exhibit XVIII upon the same ground and for the same reasons as to Defendant's Exhibit V.

Complainant objects to Defendant's Exhibit XIX upon the same ground and for the same reasons as to Exhibit V.

Complainant objects to Defendant's Exhibit XX for the reason that the same is immaterial, irrelevant and incompetent in this: [39]

- (a) That there is nothing to show that the grantor named therein was the owner of any portion of the property therein described and the descriptions therein are vague and uncertain.
- (b) That it appears upon the face of said exhibit that the same was intended as a mortgage and not as a deed.
- (c) That the title to all of the property described in said exhibit XX in so far as the same relates to the lands described in the bill of complaint was vested in the complainant at the time of the execution of said exhibit.

Complainant objects to Defendant's Exhibit XXI upon the same ground and for the same reasons as for Defendant's Exhibit XX.

Complainant objects to Defendant's Exhibits XXII, XXIII, XXIV, XXV, XXVI, and XXVII, and to each thereof, upon the same ground and for

the same reasons as to Defendant's Exhibit V.

Complainant objects to Defendant's Exhibit XXVIII upon the ground that the same is incompetent and immaterial in this:

- (a) That the grantor named in said exhibit and by whom the same purports to have been executed is not shown by the record or by the evidence of the case to have had any interest or title in or to the property therein described.

Complainant objects to Defendant's Exhibits XXIX, XXX, XXXI, XXXII, and XXXIII, and to each of them, upon the same ground and for the same reason as to Defendant's Exhibit XXVIII.

Complainant objects to Defendant's Exhibits XXXIV, XXXV, XXXVI, XXXVII, and XXXVIII, and to each of them, upon the ground that the same and each of them is incompetent, irrelevant and immaterial in this:

- (a) That neither of said exhibits contain any description of any point of diversion.
- (b) There is nothing to show that either of said notices was ever posted upon any land to be affected thereby or was ever posted at all.

[40]

- (c) That neither of said notices specified the name of the ditch by which said water is supposed to be used or diverted nor the point at which its headgate is supposed to be constructed nor the size or dimensions of the ditch in width or depth or the number of cubic inches of water intended to be appro-

riated nor the capacity of said proposed ditch.

And complainant objects particularly to Exhibits XXXVI, XXXVII and XXXVIII for the further reason that it appears upon the face of each of said notices that the purpose of the attempted appropriation was for mining purposes and otherwise.

Complainant objects to Defendant's Exhibit XXXIV upon the ground that the same is incompetent in this:

- (a) The size of the proposed ditch as contained in said exhibit is indefinite, in that the slope of the sides is not definitely stated and the capacity of said ditch is not stated in that the grade thereof is not stated.
- (b) There is nothing in the record to show that the corporation purporting to execute said exhibit filed within ten days or ever after the posting of said notices, or after the filing thereof, any map showing the route of said proposed ditch or canal.

Complainant objects to Defendant's Exhibit XL upon the ground that the same is immaterial, irrelevant and incompetent in this:

- (a) That said exhibit appears to have been executed by the Willow—
- (b) That the size of the ditch described in said exhibit is not accurately given, the slope of the sides of the said proposed ditch not being accurately described.
- (c) The capacity of said proposed ditch is not given in that the size and grade of said ditch is not given.

- (d) There is nothing in the record to show that any map was ever filed in the office of the County Clerk of Malheur County, Oregon, giving the general route of said proposed ditch. [41]

Complainant objects to Defendant's Exhibit XLI upon the ground that the same is incompetent, irrelevant and immaterial in this:

- (a) That said exhibit does not set forth the amount of the water proposed to be appropriated nor the size nor dimensions of said ditch, or the use to which it is proposed to put the water thereby sought to be appropriated.

Complainant objects to Defendant's Exhibit XLII upon the same ground and for the same reasons as to Defendant's Exhibit XL.

Complainant objects to Defendant's Exhibit XLIII upon the same ground and for the same reasons as to Defendant's Exhibit XXXIX.

Complainant further objects to Exhibits XXXIX, XL and XLII and XLIII offered by the defendant, in addition to the objections already noted, for the reason that the use to which defendant indicates by said exhibits it would apply the water to be appropriated is not a public use within the provisions of the laws of the State of Oregon, and the purposes for which the defendant corporation is organized is not to use water sought to be appropriated for general rental, sale or distribution, but for the purpose of watering and irrigating lands the title to which it has or may acquire.

Plaintiff's Objections to Introduction of Exhibits.
Filed July 6, 1910. G. H. Marsh, Clerk. [42]

And afterwards, to wit, on Thursday, the 10th day of November, 1910, the same being the 34th judicial day of the regular October, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause to wit: [43]

[Order Dismissing Bill of Complaint.]

In the Circuit Court of the United States for the District of Oregon.

No. 3398.

EASTERN OREGON LAND COMPANY (a Corporation),

Complainant,

vs.

WILLOW RIVER LAND & IRRIGATION COMPANY,

Defendant.

This cause was heretofore tried, argued, submitted and taken under advisement, and the Court being now fully advised in the matter and finding no equity in the bill of complaint herein, it is now hereby ORDERED, ADJUDGED and DECREED that the relief prayed for in the said bill of complaint, be and the same hereby is in all things denied, and that the said bill of complaint be and the same hereby is dismissed, and that the defendant have and recover of and from the complainant herein its costs and dis-

bursements in this behalf incurred and expended herein taxed at \$———.

Dated this 12th day of November, 1910.

R. S. BEAN,
Judge.

Orded Dismissing Bill. Filed Nov. 10, 1910. G. H. Marsh, Clerk. By J. W. Marsh, Deputy. [44]

And afterwards, to wit, on the 10th day of November, 1910, there was duly filed in said court an Opinion, in words and figures as follows, to wit: [45]

[Opinion.]

In the Circuit Court of the United States for the District of Oregon.

No. 3398.

EASTERN OREGON LAND CO. (a Corporation),
Complainant,

vs.

WILLOW RIVER LAND & IRRIGATION CO.
(a Corporation),

Defendant.

J. N. TEAL, WIRT MINOR, A. B. WINFREE
and W. A. JOHNSON, Attorneys for Com-
plainant.

LIONEL R. WEBSTER, JOHN B. HART,
and WM. K. LOWREY, Attorneys for De-
fendant.

BEAN, District Judge:

The defendant, an irrigation corporation organized under the laws of this State in the spring of 1908,

commenced the construction of a dam across Willow Creek, about twenty-five or thirty miles above the town of Vale in Malheur County, for the purpose of impounding the flood or waste waters of the stream, to be used in the irrigation and reclamation of large bodies of land owned or controlled by it and for sale and disposition to others.

The complainant, by proper mesne conveyances, is the owner of sundry tracts of uncultivated and unimproved land granted to the State by the Act of Congress of February 25, 1867 (14 Stat. at L. 409), to aid in the construction of a military wagon road from Dallas City on the Columbia River to Fort Boise on the Snake River. Willow Creek flows through a part of these lands between the dam site and the mouth of the stream and the complainant, insisting that it is the owner under such grant of the lands on which the defendant proposes to [46] construct its dam and reservoir, and that its rights as riparian proprietor of the land below the dam will be injuriously affected, brought this suit to enjoin the construction of such dam and the impounding of the water. The case has been tried and submitted on the testimony and the pleadings and is now for final decision.

I have read the pleadings and testimony with care, and have carefully considered the elaborate arguments and briefs submitted by counsel and the authorities cited by them, and will state my conclusions without argument or elaboration.

The complainant is not entitled to the relief sought

by injunction for two reasons: (1) The title to the land upon which defendant is constructing its dam and reservoir is in dispute, and should be settled at law. (2) The complainant has not shown that it will be substantially injured by the impounding of the flood or waste waters of the stream. It is true the dam and reservoir site is within the limits of the wagon road grant and upon land patented to the complainant's predecessors in interest, by the Government of the United States, but by the terms of the grant "mineral lands of the United States" were expressly exempted therefrom and the patent subsequently issued contains a like exception. The defendant pleads and gives evidence tending to show that the land occupied by it and upon which it is constructing its dam and reservoir is, in fact, mineral land and was known to be such at the date of the wagon road grant. That prior to and ever since that time it has been occupied and sued from time to time for mining purposes and that for many years prior to the commencement of this suit it had been used, claimed and occupied as a mining ground by [47] Cole and Insenhofer, to whose title and rights it has succeeded by proper conveyances. It therefore contends that complainant has no title to the land because it was not within the terms of the wagon road grant, and that if the land is not in fact mineral, it has the legal title thereto by adverse possession of itself and its predecessors in interest. Upon this question defendant has the constitutional right to a trial by jury, and a court of equity will not assume by mandatory injunction to oust it from possession

or enjoin it from occupying or using the premises until complainant establishes its title at law. Defendant is in possession of the property claiming title, and the complainant has a complete and adequate remedy at law and should be required to exercise it. *Whitehead vs. Stattuck*, 138 U. S. 146; 22 Cyc. 818. Complainant insists, however, that the issuance of patent by the Government of the United States to its predecessor in interest is a conclusive adjudication that the lands described therein are nonmineral. That would probably be true if the patent contained no reservation (*Barden vs. N. P. R. R.* 154 U. S. 288), but it contains a clause "excluding and excepting all mineral lands should any such be found in the tract aforesaid." This manifests an unmistakable intention on the part of the Government not to convey mineral lands, and repeals any inference that the department adjudicated or intended to adjudicate that no part of the land described in the patent was mineral.

THE IMPOUNDING OF THE FLOOD WATERS NO SUBSTANTIAL INJURY TO COMPLAINANT. The general doctrine of riparian rights is too firmly established in this State to be shaken now by judicial decision. It is useless to cite [48] authorities. The riparian proprietor is entitled to the ordinary and usual flow of a stream as long as it is of any beneficial use to him and this may, under some circumstances, include flood or overflow waters reasonable to be anticipated during ordinary seasons. *Miller & Lux vs. Madera Canal & Ir. Co.*, 99 Pac. 502; *Miller vs. Bay Cities Water Co.*,

107 Pac. 115. But in my judgment a lower riparian proprietor who is not injured by the diversion of the flood waters above his land cannot invoke the aid of a court of equity to restrain such diversion although by a nonriparian proprietor. Such is the holding of the Supreme Court of California (*Fifield vs. Spring Valley Water Work*, 62 Pac. 1054). I am not advised that the direct question has ever been passed upon by the Supreme Court of this State, but I think the tendency of the later decisions is to that effect. Indeed, in my judgment, no other rule can be adopted which will serve to develop the arid sections of the State and be in harmony with the State legislation concerning water, its appropriation and use. The modern tendency is to make the beneficial use of water the test of the right, and unless it is put to a beneficial use by a riparian proprietor or is of some substantial benefit to him, he ought not to be allowed to prevent its use by others.

Now, in this case, Willow Creek is a small stream. In spring and early summer it carries considerable water but during the latter part of the summer goes practically if not completely dry. All the normal flow has been appropriated by persons other than the complainant. It therefore has no interest whatever in such flow, nor is it concerned as to the effect the impounding of the flood waters will have thereon. During the times of heavy rains [49] or melting snows, it often happens that more water comes down from the watershed than can be carried in the channel and overflows the low lands along the banks. The flood or high water generally occurs in February

when the ground is frozen, and therefore runs off without benefit to anyone. It sometimes occurs later in the season and then saturates or irrigates the overflowed land and aids the natural growth of wild grass thereon. These floods or high waters do not occur annually but at irregular intervals, and there is no evidence to the effect that they can reasonably be anticipated every season, nor do they cover the low lands with a thin sheet of water which remains there for some time, thus thoroughly saturating the ground as is the case in some other parts of the arid section, but they run off rapidly and only continue for a few days at a time. Complainant owns five or six odd-numbered sections at sundry places along the stream below the site of defendant's proposed dam, a small portion of each of which is overflowed by the flood or storm waters. The land so overflowed is not enclosed or cultivated. The witnesses differ as to the total area of such overflowed land. Complainant's witnesses place it at from three to four hundred acres in the aggregate, while those of the defendant say it will not exceed forty or fifty acres. In any event, the area is not large and the quantity overflowed, taking it altogether, is small. The evidence is also conflicting as to whether the flood waters are a benefit or a detriment to the land overflowed. Many witnesses, settlers in the valley, have testified that, in their judgment, it is a decided detriment. Others seem to be as positive that it is a benefit, but on the whole, I am of the opinion that it has not been shown that the impounding of the flood or storm waters by the [50] defendant company

will be of such a substantial injury to the complainant as will justify a court of equity enjoining the beneficial use thereof by the defendant.

The complaint will be dismissed.

Opinion. Filed November 10, 1910. G. H. Marsh, Clerk U. S. Circuit Court, District of Oregon. [51]

And, to wit, on the 4th day of April, 1910, there was duly filed in said court, Testimony and Exhibits, in words and figures as follows, to wit:

[Transcript of Testimony and Exhibits.]

In the Circuit Court of the United States for the District of Oregon.

EASTERN OREGON LAND COMPANY (a Corporation),

Complainant,

vs.

WILLOW RIVER LAND AND IRRIGATION COMPANY (a Corporation),

Defendant.

Pursuant to agreement between counsel, the taking of testimony in the above-entitled cause was begun on this 21st day of July, 1909, at Vale, Oregon, before F. Roy Davis, heretofore appointed, qualified and acting Special Examiner in and for the above-entitled court to take and report the testimony herein.

APPEARANCES.

The complainant appearing by Huntington & Wilson, their attorneys;

The defendants appearing by John B. Hart and Lionel R. Webster, their attorneys. [57*—1†]

[**Testimony of Thomas W. Clagett, for Complainant.**]

THOMAS W. CLAGETT, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. You reside at Vale, Oregon? A. I do.

Q. And you are the agent of the Eastern Oregon Land Company, the complainants in this suit?

A. I am.

Q. How long have you occupied that position?

A. Two years.

Q. Where is your office?

A. At Vale, Oregon.

Q. Are you familiar with the general topography and conditions of Willow Creek Valley and the country adjacent to it? A. I am.

Q. State briefly and in a general way the nature of the country through which Willow Creek runs, stating approximately where it heads and its general direction.

A. Willow Creek heads in the western end of Malheur County, flows first in a northerly direction and then to the east and southeastern direction. The

* Page-number appearing at foot of page of original certified Record.

† Page-number appearing at foot of page of original Transcript of Testimony and Exhibits.

(Testimony of Thomas W. Claggett.)

limits of the Road Company begin with Section 21, Township 15 South, Range 42 East, and at that point the stream flows in a narrow canyon with [58—2] abrupt sides of from probably five to eight hundred feet. The sides of the canyon in many places are perpendicular and of the nature of columnar basalt from Section 27, where the Willow River Company is constructing its dam, the stream continues to flow in a narrow canyon for about six miles, or down to Section 14, Township 15 South, Range 42. There it opens into quite a valley and flows in a general southeasterly direction. The valley itself is composed of bottom and bench land, the bottom land varying in width from three-quarters to a mile and a half and the bench land from one to two miles in width. On the north side of the stream the land is either level or rises by an easy slope to the foothills, which are precipitous. And on the south the land is level until it rises abruptly on to the bench. The bottom land, so called, is traversed by Willow Creek. It has no well-defined channel in the larger part of the valley, the channel itself being in many places broken into several smaller channels, of an average depth of four or five feet, and four or five feet in width. These channels are choked with brush, and when there is a large volume of water comes down the valley it overflows and covers the meadow land on both sides of the stream.

Q. Down to the point where the canyon ceases and the valley commences in Section 14, Township 15 South, Range 42 East, what do you say as to whether

(Testimony of Thomas W. Clagett.)

the channel of the creek is a well defined channel?

A. Well, in the canyon the channel is fairly well defined, though it is apparent that during the high water season it fills the entire canyon.

Q. And, as I understand you, through the Valley the channel at places is choked with brush. Is the channel continuously, [59—3] or simply here and there obstructed?

A. I would say that from the canyon down to Mr. Scott's farm the channel is virtually filled up; that is, with brush. From Mr. Scott's the channel is more clearly defined.

Q. About how wide is the lower level of the valley; that is, that portion of the valley which is practically on a level with the banks of the stream?

Mr. HART.—Objected to as incompetent and the question assumes something that has not been put in evidence as yet.

A. I thought I answered that in my statement of the description of the valley—three-quarters to a mile and a half in width.

Q. What is the natural growth upon these lowlands?

Mr. HART.—We object to that as incompetent, irrelevant and immaterial. It is not specific. Counsel has the right to ask as to the nature of the growth upon any land of this company; as to what grows upon other lands is incompetent, irrelevant and immaterial and the same objection to apply to lands of people not parties to the suit. Mr. Huntington, if you can, allow the same objection to go through per-

(Testimony of Thomas W. Clagett.)

taining to the same class of questions. [60—4]

Mr. HUNTINGTON.—We agree that this objection shall apply to all questions of this character.

A. Where the land is not annually overflowed it is covered with sagebrush. Where it is inundated it is largely covered with wild grasses.

Q. Have you ever been at the point where the defendant company has commenced the construction of a dam in the canyon? A. I have.

Q. You may state whether or not you assisted in running the lines of the Government survey there; that is, re-running the lines of the Government survey.

A. I assisted in running out those lines in July, 1908.

Q. I wish you would now look at this map designated as map showing location of Willow River Land & Irrigation Company Reservoir Damsite, also the O. L. Company's lands along Willow Creek from west line of Section 21, Township 14 South, Range 42 East, to south line of Section 11, Township 15 South, Range 42 East. Were you present when the survey from which this map is prepared was made?

A. I was.

Q. In running the west line of Section 27 you may state where you found that line to be located relative to the dam of the defendant company?

A. We run that line from three different directions—from the south north and east. Running the lines from the south and north the dam of the defendant company is entirely on Section 27 with the excep-

(Testimony of Thomas W. Clagett.)

tion of about thirty-seven feet of the northern end which is on Section 28. Running the line in from the west there is a section corner one mile west of the southwest of Section 27. If that corner was [61—5] considered alone it would throw the line of twenty-seven and twenty-eight farther east, or about across the center of the dam site.

Q. But in locating that line, from where did you say you run—from the east?

A. No, sir, from the north and south, running the lines both ways—north and south.

Q. Running the lines both ways from the north and south, do I understand you to say that the small portion of the dam referred to is on twenty-eight or on twenty-seven?

A. The small portion is on Section 28.

Q. What part of Section twenty-seven would the dam be on?

A. It would be on the northwest corner of the northwest quarter of the southwest of the southwest quarter.

Q. You may state whether or not this map shows the location of the creek down the canyon from this dam site to Section 14.

A. Yes, sir, the meander line was run from the dam site to the valley.

Mr. HUNTINGTON.—We offer this map in evidence, and, with your consent, we will substitute a blue-print and return it with blue-print copy of the same.

Mr. HART.—We object to the introduction of the

(Testimony of Thomas W. Clagett.)

map for the reason it has not been properly identified.

Mr. HUNTINGTON.—We withdraw the offer and simply submit the map at this time for identification and ask to have the same marked “Plaintiff’s Exhibit I” for identification. [62—6]

Q. Do you remember about when the survey was made which furnished the data for that map?

A. About the 20th of July, 1908.

Q. Generally what is the condition of the soil—the nature of the soil along Willow Creek Valley?

Mr. HART.—We object as irrelevant.

A. The soil is volcanic ash, generally free from rock and underlaid with a strata of gravel, and, while there are some parts of the valley where the soil is of a ’dobe nature and inclined to run together, the soil of the valley as a whole is of an open and porous nature.

Q. Have you observed or made a study of the matter of precipitation throughout the valley, and can you state approximately what the annual precipitation is?

A. I have looked up the matter the same as anyone who is interested in farming subjects would look it up.

Mr. HART.—Objected to as incompetent, immaterial and hearsay.

Q. From what source have you gained your information?

A. From the bulletins of the Weather Bureau and from the report of the State Engineer for 1905 and 1906.

(Testimony of Thomas W. Clagett.)

Q. Now, from that information that you have received, and also from your own observation, you may state approximately what the precipitation is.

Mr. HART.—Objected to as incompetent and as hearsay, and combining two questions in one.

[63—7]

A. The figures given by Mr. Beall are for a five-year period—the annual precipitation is 10.71 inches. Carried over a ten-year period, in which there were two absent years, the precipitation was 9.89 inches.

Mr. HART.—Objected to as incompetent, and ask that it be stricken out, for the reason it is incompetent and hearsay and not the best evidence.

Q. Those are averages, you mean, do you?

A. Yes, sir, the average for the period.

Q. You say that information is from the Government Weather Bureau Publications and the State Engineer's Publications?

A. As to the ten-year period, I took that from the bulletin of the Weather Bureau Service.

Mr. HART.—Objected to as hearsay, not the best evidence and incompetent.

Q. You may state whether or not, from your own observation, these figures are approximately correct?

Mr. HART.—Objected to as the witness has not shown his competency to express an opinion upon that subject.

Q. I only know that the annual precipitation is very light. I cannot state whether the figures are correct or not from actual knowledge.

Q. During what period of the year, so far as you

(Testimony of Thomas W. Clagett.)

have observed, is the heavy precipitation?

A. From November to March. [64—8]

Q. What is the condition as to rainfall after March and up to November?

A. We have some spring rains from March to June, but the rainfall during June, July and August, the growing months, is practically nothing.

Q. Referring again to the dam site of the defendant company: Is there any natural object in the canyon at the northerly or northeasterly end of their dam, and, if so, what?

A. There is a large volcanic butte there.

Q. Just describe that perfectly.

A. It is simply what might be called almost a promontory rock that stands by itself and of a different nature from anything else in that part of the canyon.

Q. Have you ever made any examination, or assisted in the making of any survey of the portion of the lands owned by the complainant company along Willow Creek, and through which the stream runs to ascertain the amount of the lands which are annually overflowed, or have the appearance from their surface of being subject to overflow? A. I have.

Q. With whom was that survey made?

A. With John E. Johnson.

Q. And when? Q. In June, 1909.

Q. I hand you section plats prepared by John E. Johnson, Surveyor, and ask you if that is the same person to whom you have just referred?

Mr. HART.—Objected to as incompetent, irrele-

(Testimony of Thomas W. Clagett.)

vant and immaterial, and not the proper way to prove a plat or map. [65—9]

A. It is.

Q. I wish you would refer to those plats and state, commencing with Section 31, Township 15 South, Range 43 East, W. M., what is the nature of the channel of the creek through that section?

Mr. HART.—Objected to because it is not a memorandum prepared by this witness and he should state from his independent knowledge and not from something furnished from somewhere else, and for that reason it is incompetent.

A. I helped to make the survey from which this plat was prepared and can say from personal knowledge that the channel on the north side of the section was about 200 feet wide and about 18 feet deep; and on the east side, where it leaves the section, it is 100 feet wide and about the same depth.

Mr. WEBSTER.—You do not claim anything in the north half of that section, do you?

A. We claim all but 40 acres of that section.

Q. What is the nature of the ground on each side of the channel through that section?

A. It rises gradually from the channel until, on the west side, until it reaches the hill which rises abruptly onto the bench and on the east side of the stream it rises gradually until it reaches the bounding hills on the north.

Q. If a large quantity of water were flowing through the channel of the creek through that section would it be possible to overflow any part of the sec-

(Testimony of Thomas W. Clagett.)

tion on each side of the channel by damming the creek or otherwise. [66—10]

Mr. HART.—Objected to as incompetent, irrelevant, immaterial and indefinite—one person might understand a large volume of water to mean one thing and another another.

A. If the creek were dammed so as to fill the creek channel with water to the top of the banks it could be led out onto the land by ditches.

Q. I now call your attention to Section 5, Township 16 South, Range 43 East, W. M. What is the nature of the channel of the creek through that section?

A. It is very much smaller and of an average depth of probably 12 feet, and, on the north of the section, about 8 feet in width on top and about 16 feet on the bottom and gradually diminishing as it flows, or recedes to the east.

Q. Is any portion of that section apparently overflowed land?

A. Yes, sir; it has at different times been entirely overflowed; that is, all the bottom lands, which consists of some three hundred acres, but in ordinary seasons about eighty-eight are subject to overflow.

Q. What do you say as to whether or not the water could not be taken out of the creek onto the lands on each side of the creek, the lands owned by the company in that section, to wit, the north half and the southeast quarter, and the northeast quarter of the southwest quarter?

Mr. HART.—Objected to for the reason the wit-

(Testimony of Thomas W. Clagett.)

ness has not shown himself competent from an engineering or irrigation standpoint to express an opinion.

A. I would say that 250 acres of the tract could be irrigated by damming the stream and taking ditches out. [67—11]

Q. I call your attention now to Section 23, what is the condition of the creek—the channel of the creek, where it flows through Section 9 in Township 16 South, Range 43 East, W. M.?

A. It barely adjoins Section 9.

Q. And could any parts of the lands owned by the complainant company in Section 9 be irrigated or flooded by damming up the stream on the section?

Mr. HART.—Objected to as incompetent, and for the reason the witness has not shown himself qualified as a hydraulic or irrigating engineer.

Mr. HUNTINGTON.—This objection may go to all this character of questions.

A. About ten acres are naturally and no more could be flooded.

Q. I now call your attention to the south half and the south half of the north half, and the northwest quarter of the northwest quarter of Section 26, Township 16 South, Range 43 East, W. M. What is the condition of the channel through that land?

A. There are two small channels of an average depth of about four feet, and of an average width varying from five to twelve feet, although both channels are very much grown up and choked with brush.

Q. Has any part of that overflowed, and, if so, how much?

(Testimony of Thomas W. Clagett.)

A. About 45 acres, the ordinary seasons.

Q. Does that 45 acres include all the overflowed land in that section that I have described claimed by the company? I am referring to the lands of the complainant company.

A. There are also 80 acres in the section which are overflowed, [68—12] which are claimed by the company but which are in dispute.

Mr. HART.—Objected to as irrelevant and doesn't show the company is the owner of the property and also is not described in the complaint or petition.

A. There are also eighty acres in the section that are overflowed, claimed by the company, but this tract is in—their title to this tract is in dispute.

Q. The eighty acres you have last referred to is 80 acres of the land in dispute and not described in the complaint? A. Yes, sir.

Q. Eliminating, now, the 80 acres you have referred to, which you say is in dispute, and is not described in the complaint, is there any more of this Section 23 that is owned by the company and about which there is no dispute as to their title that could be irrigated from the creek by damming on that land? A. I would think not.

Q. I now call your attention to Section 25. Describe the channel through that section.

A. The channel here is largely clear from brush and divided into two small channels. The width on top for the wider or main channel would be 25 feet, but only three feet on the bottom to an average depth of about five feet.

(Testimony of Thomas W. Clagett.)

Mr. WEBSTER.—Which channel do you mean, the north or south channel?

A. We call that the east channel, or north channel.

Q. How much of that land is naturally overflowed? A. About 41 acres.

Q. Is any more of that section capable of inundation by damming [69—13] up the creeks?

A. Only to a very small extent.

Q. Approximately how much?

A. Not over 20 or 30 acres.

Q. I call your attention to the west half and the southeast quarter of Section 31, Township 16 South, Range 44 East, W. M. How does the creek—or describe the channel of the creek through that section?

A. I don't recall the channel on that section.

Q. I call your attention to a blue-print map here that shows the exterior limits of the grounds, and simply for the purpose of refreshing your memory as to the general location of that section as to the creek. Can you now recall how the stream is through that section?

A. Well, the stream barely adjoins Section 31. It doesn't traverse the portion which the company now owns.

Q. I call your attention to Section 5, Township 17 South, Range 44 East, W. M. Do you remember how the creek crosses that section, or that portion of the section which the company owns?

A. My recollection is that the main channel doesn't cross the portion of the section which the

(Testimony of Thomas W. Clagett.)

company owns.

Q. The main portion of the channel?

A. Yes, sir.

Q. Is there any part of the channel which does?

A. It is very hard in the lower part of the valley to determine where the true channel of the creek is, and I could not say that the small channel that crosses that section carries water.

Q. Would it carry water in the higher stages of water? A. Yes, sir. [70—14]

Q. But you couldn't tell whether the channel which crosses the land entered by the channel in that section was the original channel or otherwise?

A. I could not; no, sir.

Q. How about Section 9 in that township?

A. It is crossed by the channel. There are two channels upon Section 9. These are of a depth of about ten to twelve feet and the same in width.

Q. Are any portions of that section naturally overflowed? A. There are not.

Q. Are they susceptible of being overflowed by damming the creek? A. No, sir.

Q. How about Section 15, Township 17 South, Range 44 East, W. M.?

A. There are several small channels upon Section 15, varying in depth from four to six feet and about 81 acres are overflowed—naturally overflowed.

Q. Could any more of that land be inundated by damming the channel of the creek?

A. The channels are too small to hold any water to lead out.

(Testimony of Thomas W. Clagett.)

Q. But suppose those small channels were dammed up, would it increase the acreage of overflowed land? A. Not appreciably.

Q. I call your attention to the—what are the widths of those channels?

A. I would say from six to ten feet.

Q. I call your attention to the west half and the southeast quarter of Section 23, Township 17 S., R. *rr* East, W. M. Describe the channel through that land.

A. In the west half of the section the channel is about 25 feet in width and four feet in depth, and free from brush. In the southeast quarter of the section it is broken into several [71—15] small channels of an average depth and width of about four or five feet.

Q. How much of that land is naturally overflowed, if any?

A. About 120 acres, aside from the northeast quarter of the section, which the company claims but which is in litigation.

Q. And which is not described in the complaint?

Judge WEBSTER.—We move to strike out all that evidence about the northeast quarter on the Brosland land.

Q. That is the land claimed by Brosland and also by the company?

A. Yes, sir; about 155 acres of meadow.

Q. Eliminating, now, the tract that is in dispute between the company and Brosland, to wit, the northeast quarter, how much of that section, if any,

(Testimony of Thomas W. Clagett.)

in addition to the amount naturally overflowed, could be inundated by the channels of the creek?

A. I would say that none of it could be inundated.

Q. How much did you say in the west half and the southeast quarter of that section is naturally inundated? A. 120 acres.

Q. I call your attention to Section 25. What is the condition of the channel there through that section—township 17 S., R. 44 E., W. M.

A. It is a well-defined channel, clear from brush and none of the abutting land is overflowed.

Q. State whether or not any of it is capable of being overflowed by the damming of the channel of the creek.

A. I would think none of it could be.

Q. Have you figured up the amount of land owned by the company that is riparian to Willow Creek; that is, land through [72—16] which Willow Creek passes, including the lands that abutt the lands that are actually tapped by the creek?

Mr. HART.—Objected to as incompetent and immaterial, and calling for a legal opinion also of the witness, and not the best evidence.

A. I have.

Q. What is the total acreage?

A. Something over seven thousand acres.

Q. It is alleged in the complaint 7120 acres. What do you say as to whether that is the amount?

A. That would be the amount.

Q. What, if any, crops are capable of being produced upon these inundated lands, or lands which are

(Testimony of Thomas W. Claggett.)

capable of being inundated, which belong to the company? A. Wild hay crops.

Q. Are any of those lands leased at the present time by the company? A. They are.

Q. What tracts?

Mr. HART.—Objected to as incompetent.

Q. I will withdraw the question. Approximately how many acres of this inundated land are now leased by the company?

Mr. HART.—Objected to as incompetent and not the best evidence.

A. A. All of it. [73—17]

Q. All that you have referred to?

A. Yes, sir; of the inundated land; yes, sir.

Q. What is the rental value of that land?

Mr. HART.—Objected to as incompetent and immaterial.

A. The land which produces hay is leased for about \$1.00 a ton to the company for the output of the land.

Q. Is that net, do you mean?

A. That is net, yes, sir.

Q. What is that hay worth?

A. On an average of \$4.00 a ton.

Q. Without any water supply for those inundated lands, what would be the rental value of that?

A. They would have no rental value, because our lands on the creek which are not inundated do not rent.

Q. Have you observed the condition of the channel of the creek during the past two seasons, taking

(Testimony of Thomas W. Clagett.)

it from the month of—from the 1st of June down until the 1st of November? A. I have.

Q. What is the condition as to there being any water flowing in the creek?

A. In the main part of the valley there is no water.

Q. During the past two seasons—I refer now to the spring of 1908 and 1909—was there any overflow of the creek in the months of January, February, March or April?

A. I don't think there was, but I cannot answer that positively. I would say that if there was it was for a very short period of time.

Q. Now, I think that is all of the direct examination. If you have no objection I would like to withdraw Mr. Clagett and [74—18] take the testimony of one or two farmers who are anxious to get away and put Mr. Clagett on again later.

Mr. HART.—That will be all right.

Mr. HUNTINGTON.—By consent of counsel, the witness is now withdrawn, with the understanding that he will be returned to the stand for cross-examination later.

[Testimony of John Norwood, for Complainant.]

JOHN NORWOOD, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. Where do you reside?

A. Willow Creek.

(Testimony of John Norwood.)

Q. How long have you resided in Willow Creek Valley?

A. I have been there for the past seven years.

Q. How long have you resided in the vicinity of Willow Creek Valley? Q. Twenty-seven years.

Q. What is your age? Q. Twenty-seven.

Q. Are you familiar with the conditions as to the flow of water in Willow Creek generally?

A. Yes, sir. [75—19]

Q. You may state what is the ordinary condition of the water during the early portion of the year, from January, say, down until the first of April in ordinary seasons.

A. Well, in ordinary seasons when the snow goes off the valley is flooded there, the biggest part of it.

Q. From what source principally do the water of Willow Creek come?

Mr. HART.—Objected to as incompetent unless the witness states from his own knowledge and not from hearsay.

A. It comes from the upper Willow Creek country, the greater part of it, I think.

Q. Is the flood season generally during the time from the melting of the snows about the head of the creek? A. Yes, sir.

Q. How long does that flood water ordinarily continue?

A. Well, that is according to the bottom land; on some of the bottom lands it stays about a month at a time.

Q. But generally speaking through the valley?

(Testimony of John Norwood.)

A. Well, it would come down there in a rush for four or five days and run over the land and be gone where it doesn't usually lay.

Q. What is the effect on these inundated lands of this natural overflow?

Q. Well, for wild meadows where they don't overflow they don't raise any hay.

Q. Does the overflowing of the land cause the land to be wild meadow? Q. Yes, sir.

Q. What kind of hay grows upon this overflow lands? [76—20]

A. Well, what they call red-top and blue-joint and wire-grass.

Q. What is the fact as to whether or not those are valuable crops for hay?

A. They use it for hay.

Q. Is it merchantable? A. Yes, sir.

Q. Was there any overflow during the spring of 1908 or the spring of 1909?

A. No, none to speak of at all.

Q. What has been the result upon these lands which are naturally overflowed of the failure of the overflow during the past two seasons?

Mr. HART.—Objected to as incompetent and immaterial, and further that the question as made applies to lands other than those described in plaintiff's complaint, and as to those lands it is immaterial and calls for an opinion of the witness. He has not shown himself competent to express an opinion on that question.

A. There is nothing grows where they don't over-

(Testimony of John Norwood.)

flow—no hay.

Q. How much land along Willow Creek do you farm?

Mr. HART.—Objected to as immaterial.

A. I have got 440 acres there.

Q. Does Willow Creek run through that?

A. Yes, sir.

Q. Do you lease any land from the Eastern Oregon Land Company? A. Yes, sir.

Q. How much. [77—21]

A. Well, I don't know just what the lease calls for. I know about how much land I have got.

Mr. HART.—Objected to as not the best evidence.

Q. Is any part of that overflowed land?

A. Yes, sir.

Q. What is the fact as to whether or not you have been able to harvest any crop of hay, or any other crop, from that overflowed land of the company's during the past two years?

A. No, sir; I have not cut a ton of hay on it.

Q. How much hay is ordinarily cut from that same land during seasons when the flood waters inundate it in the spring?

A. Between 100 and 125 ton, I think.

Q. To how many acres?

A. There is about 80 acres, I think.

Q. Are the conditions which you have described as to the land which you have leased of the Eastern Oregon Land Company any different from their other inundated lands along the valley?

Mr. HART.—Objected to as calling for the opinion

(Testimony of John Norwood.)

of the witness and he has not shown himself competent to express an opinion. A. No.

Q. When there is no flood water coming down the valley in the spring, the usual time for flood water, what is the effect upon the flow of water in the creek during the summer months?

A. Well, if there is no flood water, why generally there is no water at all.

Q. When there is flood water, what is the condition? [78—22]

A. Why, we generally have some water along later on.

Q. When the flood water overflows and inundates the valley, I understand you to say that thereafter, and after the flood waters were gone there would be still some seepage water flowing in the creek? Is that correct? A. Yes, sir.

Q. From what source would these seepage waters come?

Mr. HART.—Objected to as incompetent, immaterial and witness has not shown himself competent.

A. Well, I don't know as I could answer that unless the ground would be full of water and it would seep into the creek.

Q. What, if any, effect does the failure of the flood waters have upon the wells along the valley?

Mr. HART.—Objected to as purely speculative, being beyond the realm of knowledge and the witness has not shown himself competent and irrelevant and the company haven't any wells on its property.

(Testimony of John Norwood.)

A. Well, last year a few of the wells went dry there, I believe. My well did.

Q. How about this year?

A. Well, there isn't but very little water in it now.

Q. How far is your well from the creek?

A. Oh! It isn't quite a half a mile.

Q. What do you say is the fair rental value of these inundated lands when the annual overflow occurs in the spring?

Mr. HART.—Objected to as incompetent and not the best [79—23] evidence, and witness has not shown that he knows.

A. When they do overflow?

Q. Yes, sir.

A. Well, a ton or a ton and a half of hay to the acre.

Q. That is, a ton or a ton and a half of hay to the acre would be the fair rental value?

A. Yes, sir.

Q. That would be net to the owner of the land?

A. There would be some expense for putting it up.

Q. But suppose that the owner of the land was leasing the land, what rental could he get for it?

Mr. HART.—Objected to as incompetent, and not a measure of value.

A. Why, I should think he had ought to get \$2.00 an acre for it.

Q. That would be on a cash basis?

A. Yes, sir.

(Testimony of John Norwood.)

Q. Without the annual overflow what would be the rental value of that land?

A. Oh! I don't know. I wouldn't give much for it.

Q. Well, would it be worth anything?

A. There might be a little pasture on it, but very little.

Q. If it were used for pasture what would it be worth per acre?

A. Oh! It wouldn't be worth practically anything.

Q. For the lands which you, yourself, own that are riparian to Willow Creek do you have an irrigating ditch?

Mr. HART.—Objected to as incompetent, immaterial and outside of the issues in this case. [80—24]

A. Yes, sir.

Q. About what is the size of your ditch?

Mr. HART.—Objected to as incompetent, immaterial and outside of the issues in this case.

A. Oh, I don't know. It is probably three and a half feet or four feet on the bottom and I don't know how wide on the top.

Q. Do you know how much water right you have?

A. No, I don't.

Q. About how deep is your ditch? A. —

Mr. HART.—Let the same objection to all these questions of this character apply.

A. Oh, it is probably three feet deep.

Q. What is the fact as to whether or not any water flows in your irrigating ditch during the sea-

(Testimony of John Norwood.)

sons when there if no flood water in the spring coming down the creek?

Mr. HART.—Objected to as incompetent, immaterial and raising issues not contained within the pleadings.

A. Why, if there is no water in the creek I don't get any.

Q. Well, when there is no flood water in the spring is there any water at all in the creek opposite your land?

A. Well, it already run there a few inches I think a little while this spring, but you could never get a ditch wet up with it. [81—25]

Cross-examination by Mr. HART.

Q. Where do you live?

A. On Lower Willow Creek.

Q. What is the description of your land you live on that you speak of?

A. The east half of Section 14, Township 16 S., R. 43 E., W. M., and the south half of the southwest quarter.

Q. You mentioned some land of the complainant company which you had leased. Can you describe it?

A. No, I can't. It is in Section 23.

Q. Does it adjoin your land? A. No, sir.

Q. This ditch of yours that you speak of, it serves your land? A. Yes, sir.

Q. Was there any water in it this year?

A. No, sir.

Q. Did you get any from it last year?

A. No, sir.

(Testimony of John Norwood.)

Q. Did you get any from it the year before?

A. Yes, sir.

Q. During the summer?

A. Oh, probably up to the first of June. I wouldn't be certain.

Q. In other words you had the flood waters of the year before in the ditch up to June, that would be of 1907?

A. Yes, sir, I had water in it in 1907.

Q. Up to June? A. I couldn't say.

Q. That is what you just now stated.

A. Well, yes, sir.

Q. Did you have any water in it in 1906?
[82—26] A. Yes, sir.

Q. Up to June?

A. I couldn't say what time it was.

Q. That is as near as you can give it?

A. Yes, sir.

Q. And in 1905 it was the same?

A. Yes, sir.

Q. That is your best recollection as to the dates when you had the water in your ditch all those years?

A. Yes, sir, about that time.

Q. And you had none in the months of July, August and September after June during those years? A. No, sir.

Q. And had none this year during those months?

A. No, sir.

Q. And last year you had no water during those months? A. No, sir.

Q. The time for the irrigation of crops is, for the

(Testimony of John Norwood.)

last portion of the month of June, and the months of July and August, during the period of growing crops—that is the period of irrigating, isn't it?

A. It might be in some places; it isn't on Willow Creek.

Q. That is not the irrigating season on Willow Creek?

A. No, sir, they don't irrigate much there during July and August.

Q. They don't irrigate because they don't have the water? A. No, sir.

Q. That is the real reason they do not. If they did have water during that time, that is the time they would be irrigating? A. Yes, sir.

Q. The waters of the overflows, and the waters of the winter [83—27] rains serve the purpose of nourishing crops during the earlier parts of the season? A. Yes, sir, they help some.

Q. And it is to supply the nourishment in the shape of water for the crops in the growing seasons during the months of July and August that irrigation is done, isn't it? A. Yes, sir.

Q. And you tell us that none of these ditches, whether you have floods or whether you don't have floods, have any water in them during the months of July and August?

A. I don't know about the upper ditches, but I don't.

Q. Well, this year isn't so dry but that the property you had leased from the complainant company had water upon it this year?

(Testimony of John Norwood.)

A. No, sir.

Q. Wasn't there water upon it this year?

A. No, sir.

Q. Are you sure of that—that it wasn't flooded this spring? A. Yes, sir.

Q. Did your own land have any flood waters upon it this spring?

A. The lower part of it, where there is a little low basin that is lower than the creek channel, that filled up.

Q. That filled up with water this spring?

A. Yes, sir.

Q. The creek channel ran over and run some water in it?

A. Yes, sir, and run through there.

Q. But there was none on this land the company had leased?

A. No, sir, I don't think they ever ditched it.

Q. What time of the year was it your well went dry that you spoke about?

A. I didn't say it went dry. [84—28]

Q. Didn't you say that you well went dry last spring? A. I said, "Very near dry."

Q. Then, it didn't go quite dry?

A. No, sir, it didn't go quite dry.

Q. Well, every year during the months of July and August the water gets pretty low down in your well, doesn't it, ever since you have lived there?

A. No, sir, I don't think it does.

Q. Will you swear it doesn't get pretty low during those years?

(Testimony of John Norwood.)

A. No, sir, I don't think it does.

Q. I am speaking about these other five years.

A. Yes, sir, I lived there seven years.

Q. How many years have you had your well there? A. Seven years that I know of.

Q. Those two years were the first time that the water has gotten low in your well since you have been there? A. Yes, sir.

Q. And isn't it a fact the water in your well has gotten low every year since you have been there?

A. No, sir.

Q. The water has always been up in your well every year except those two years?

A. Yes, sir.

Q. Are you sure of that, Mr. Norwood?

A. I think I am.

Q. You think you are sure?

A. I think I am.

Q. Has your well overflowed ever?

A. No, sir.

Q. Never has overflowed?

A. No, sir. [85—29]

Q. How much higher is your well than the bed of the creek? A. It is considerably higher.

Q. Well, about how much higher—a hundred feet?

A. Down at the bottom—we had to go about eight to ten feet, I think about eight feet; and about twenty-five feet where I am.

Q. Well, now, please express it and answer the question I asked you a moment ago. How much

(Testimony of John Norwood.)

higher is the place where your well is than the bank of the creek along through there?

A. I would just have to guess at it.

Q. Well, is it about one hundred feet?

A. No.

Q. About how much?

A. Oh, probably ten feet higher, I guess.

Q. You mean to say your place is only ten feet higher where the well is than the surface of the creek?

A. I think that is probably all.

Q. And the depth of your well is how much?

A. Well, I have been digging about—I have got more than one well.

Q. You have more than one well?

A. I have more than one well, yes, sir, down on the bottom.

Q. What is the depth you have been digging, about?

A. Twenty-five feet.

Q. In which well?

A. The one at the house.

Q. How many wells have you got?

A. Three wells.

Q. You have got three wells?

A. Yes, sir.

Q. It was this one up at the house you say got pretty dry?

[86—30]

A. Yes, sir.

Q. Where are the other wells?

A. One down in the bottom and another dry one at the house.

Q. You have another dry well at the house?

A. Yes, sir.

Q. The one at the bottom has water in it?

(Testimony of John Norwood.)

A. Yes, sir, I just dug it. It has water now; I don't know whether it will go dry or not.

Q. How deep is that? A. Fourteen feet.

Q. When did you dig this other dry well up at the house?

A. I have had it for two or three years.

Q. When did you dig it?

A. Three years ago.

Q. Has it been dry ever since?

A. It had a little water in it when I quit digging.

Q. It had a little water in it when you quit digging? A. Yes, sir.

Q. Is it any higher than the other well at the house that you have been talking about?

A. No, sir; I think they are about forty feet apart.

Q. You dug that well, then, in 1906—three years ago?

A. 1906 or 1907, I couldn't say exactly, somewhere along there.

Q. Since then there has been one big flood of the year—but one big flood, hasn't there?

A. Since when?

Q. Since you dug that well up there by your house?

A. Yes, sir, I believe we had a flood the next spring.

Q. And irrespective of that big flood the well at the house went dry?

A. Well, the dry well always was dry. [87—31]

Q. You said it had water in it when you quit

(Testimony of John Norwood.)

digging and irrespective of the big flood that well went dry. A. Yes, sir.

Q. And if it is the water that seeps in from the ground and fills up the ground, why didn't it fill in this well? A. I couldn't answer that.

Q. But you people say you believed your wells went dry because they didn't get the seepage water—that was the reason the water was getting scarce?

A. Yes, sir, I believe it was.

Q. Who told you to make that explanation?

A. Nobody.

Q. Why didn't the same explanation explain why your dry well went dry?

A. I suppose not pumping the water out of the well until it didn't fill any more.

Q. Because you never used any water out of the well was why it went dry. That is your opinion upon that subject? A. Yes, sir.

Q. Now, you told us a while ago that the reasonable rental value of that land that was overflowed was about a ton and a half of grass per acre per year.

A. From a ton to a ton and a half.

Q. You still wish to make that statement—that is your judgment on the rental value?

A. Yes, sir.

Q. And you also told us at the same time, or a little while later, that you had eighty acres of land leased and that it produced from a hundred to 120 tones per year? A. Yes, sir.

Q. Then the rental value of the property is all of the hay it [88—32] produced, isn't it? In other

(Testimony of John Norwood.)

words, you would have to pay more hay for the rental value than the land would produce? You said eighty acres produced from 100 to 120 tons per year, and you said the rental value for that same 80 acres would be from a ton to a ton and a half per acre—the rental value would be everything you could get out of it. You never rented this land at any such figure, did you?

A. I never paid that much. When I went into that place I expected to make a dollar a ton.

Q. But you testified that the rental value of the land was from a ton to a ton and a half an acre, so that you would simply be giving them your labor. That is the substance of it.

A. No, sir, it is not.

Q. You didn't think the Eastern Oregon Land Company acted as—what did you pay them for it? Get down out of the clouds.

A. \$375.00.

Q. For a section of land?

A. No, sir, not for a section of land.

Q. How much was it you got?

A. I don't know just what the lease calls for?

Q. Don't you know that it calls for a section of land?

A. It probably does.

Q. It probably does. Let us have the facts, then.

A. I don't know just where the land is that I rented.

Q. That is at the rate of some 12½¢ an acre that you agreed to pay for it? That was the rental value, then, instead of \$2.00?

A. I don't know whether it calls for eighty acres

(Testimony of John Norwood.)

or four thousand.

Q. You just saw a bunch of land and you says: "I will rent this"?

A. Yes, sir, and I rented the other place and I rented this [89—33] land with it.

Q. According to your best remembrance you rented a section of land?

A. No, sir, I never got a section of land.

Q. And you don't know how much you did get?

A. I know I got eighty acres.

Q. You know you got eighty acres that you intended to cut some grass from? A. Yes, sir.

Q. And the remainder you don't know much about? A. No, sir.

Q. And you say you got—

A. Probably eighty acres.

Q. Even at that figure that is less than a dollar an acre?

A. Well, Mr. Clagett said—

Q. That is less than a dollar an acre?

A. Yes, sir.

Q. Explain, Mr. Norwood, why you stated that the reasonable rental value of the land was \$2.00 an acre when here you are renting it at less than one?

A. That is what I thought it was worth.

Q. How long have you had the land?

A. I had it two dry years.

Q. Have you ever paid your \$75.00 for a year?

A. I paid \$81.00.

Q. Did you tell the Eastern Oregon Land Company that you thought it was worth \$2.00 an acre

(Testimony of John Norwood.)

when you rented it for one dollar? A. No, sir.

Q. Never told them what you thought until you got into this courthouse? [90—34]

A. No, sir.

Q. You are familiar with the irrigation project that had charge of the Malheur Ditch some few years ago?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent and immaterial.

Q. I will withdraw that question. Are you familiar with the ditch known as the Eldorado Mining Ditch? A. No, sir.

Q. You know where the ditch lies, don't you?

A. No, sir.

Q. You never saw it and never crossed it?

A. Yes, sir, I saw it about fifteen years ago and crossed it.

Q. Have you seen it since then?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent and immaterial.

Q. That ditch delivered water, didn't it—

Mr. HUNTINGTON.—This objection may go to all of this testimony?

Mr. HART.—Yes, sir.

Q. That ditch delivered water to Willow Creek up above your place?

A. I don't know anything about it.

Q. You don't know whether it did or not?

A. No, sir.

Q. Isn't it true that it emptied water into Willow Creek above your place until two years ago? [91—35]

(Testimony of John Norwood.)

A. I couldn't tell you.

Q. How far up Willow Creek have you ever been?

A. Well, I have been to the head—no. I never was to the head of upper Willow Creek; I have been up Willow Creek fifty miles.

Q. But you have never been to the head?

A. No, sir, I don't know where it is.

Q. Have you been up there during the flood seasons? A. On upper Willow Creek?

Q. Yes, sir.

A. No, sir.

Q. What months are the flood seasons?

A. Anywhere from January to March, I guess.

Q. The flood season is from January to March?

A. Yes, sir.

Q. Are you familiar with Gum Creek? Do you know where it is located? A. Yes, sir.

Q. You have seen it on a rampage? You have seen it when it was flooded?

A. Yes, sir; I have seen some water going down there.

Q. In large volumes? A. No, not so much.

Q. Would that be running down at the same time the water in Willow Creek was running down?

A. Yes, sir.

Q. Are you familiar with Sheep Corral Creek? Sheep Corral Gulch?

A. That is off from Gum Creek.

Q. You have seen water running down it at the same time the water was running down Willow Creek? A. I couldn't say I have. [92—36]

(Testimony of John Norwood.)

Q. Have you seen water running down Turner Creek? (Or Current Creek.) A. Yes, sir.

Q. It would be running down there at the same time that Willow Creek had flood water running down; that is, during the time Current Creek and all the rest of the creeks had water running down them? A. Yes, sir.

Q. All of these creeks I have mentioned flow into Willow Creek away on this side of Emory Cole's property? A. Yes, sir.

Q. Did you testify that you knew where the dam is being constructed? A. Up in the canyon?

Q. Yes, sir. A. No, sir.

Q. You know where the mining operations have been carried on for years beyond Emory Cole's?

A. No, sir.

Q. You never saw the mining operations carried on there?

A. I have been down the canyon once about ten years ago and never noticed.

Q. You don't recall that? A. No, sir.

Q. There are creeks on the other side of Willow Creek that flow into Willow Creek, don't they—Beaver Creek?

A. That flows in right at the head of Cole's. I don't know just where.

Q. It comes in on this side of the canyon, Beaver Creek, doesn't it?

A. No, sir, it comes in on the east side.

Q. I mean toward Vale?

(Testimony of John Norwood.)

A. Yes, sir, at the mouth of the canyon. [93—

37]

Q. Well, there is Fipps Creek also?

A. Yes, sir.

Q. Have you ever seen the water in Fipps Creek?

A. No, sir.

Q. How about Road Canyon?

A. I don't know as I was ever up there at the time the water was running down it.

Q. You know that it shed the snow from the mountain side and it sheds water in each of those creeks and runs down? A. Yes, sir.

Q. Isn't the flood water you are speaking about principally coming down from these creeks?

A. A part of it.

Q. Isn't the great portion of that flood water from these creeks? Isn't that where Willow Creek gets its big supply from all those branches coming down the canyon?

A. They might. The water in the creeks run off in one night, the biggest part of it. There would be a little water run into them and the biggest part of it would go off in twenty-four hours.

Q. Have you ever seen that yourself?

A. I have been right there myself and saw it.

Q. Do you say that as a statement of fact pertaining to Gum Creek—that the water would go off in a day? A. That runs a little all the time.

Q. And it runs down into Willow Creek?

A. Yes, sir.

Q. Then, Willow Creek doesn't get entirely dry?

(Testimony of John Norwood.)

A. It might close up at times.

Q. What becomes of the water in Gun Creek?

A. Old man Lockett uses the greatest part of it.

[94—38]

Q. Then, it doesn't run down to your place all the time? A. No, sir.

Redirect Examination by Mr. HUNTINGTON.

Q. You were asked on your cross-examination about this dry well. How deep is that? Is it as deep as the other?

A. No, sir, I think about three or four feet; I think probably two feet.

Q. Three or four feet less than the well you use ordinarily? A. Yes, sir.

Q. With regard to the land which you lease from the complainant company: In making that lease did you take into consideration at all the land lying outside the bottom?

A. No, sir, there is a fence around that bottom. I don't know what he did put in the lease.

Q. Is there any part of it fenced except that part that is in the bottom; that is, this flood land?

A. No, sir.

Q. And regardless of what the lease described you were paying for the use of that bottom land, as I understand it?

Mr. HART.—Objected to as incompetent, immaterial and not the best evidence. The lease shows for itself what he leased, and ask that it be stricken out.

[95—39]

A. Yes, sir.

(Testimony of John Norwood.)

Q. You say you paid \$75.00 to the company?

A. I paid \$81.00 to the company; yes, sir. \$75.00 and \$6.00 interest.

Q. Didn't you lease also a small portion of Section 13, for which you paid \$60.00?

Mr. HART.—Objected to as incompetent and immaterial.

A. \$60.00 for one piece and \$15.00 for the other.

Q. \$75.00 for all of it? A. Yes, sir.

Mr. HART.—Can you bring the two leases and have them read into the record?

Mr. HUNTINGTON.—Yes, sir.

Mr. HART.—We wish to object to all his statements as not proper and not the best evidence.

Q. In your direct examination you were asked what would be the rental value of this land, assuming that you got the flood waters, and you said, as I understood it, a ton or a ton and a quarter of hay?

A. Yes, sir, a ton or a ton and a half of hay.

Q. Now, you paid, as I understand it, a cash rental? A. Yes, sir.

Q. In doing that what is the fact as to whether or not you took all chances of your getting any water at all?

Mr. HART.—Objected to as leading and argumentative. [96—40]

A. Yes, sir, I think I took all the chances.

Q. Now, I don't know whether I asked you this question or not before, but I will repeat it if I did: Assuming that land is overflowed every spring as it was wont to be flooded prior to 1908 about what

(Testimony of John Norwood.)

amount of hay would be produced on it? I am speaking now of the land which is naturally overflowed and not overflowed by irrigating ditches?

Mr. HART.—Objected to as incompetent and immaterial, and assuming something which has not been proven in the case, to wit, that it was naturally overflowed previous to 1908.

A. About from 100 to 125 ton of hay.

Q. To the 80 acres?

A. Yes, sir, or whatever amount of land there is there.

Q. Now; prior to 1908 had the creek ever gone dry opposite your place as early as the last of June; that is, had it ever entirely gone dry?

A. No, sir, I don't think it ever did.

Recross-examination by Mr. HART.

Q. You say you don't recall the creek being dry up to June at any other years previous to three years ago? A. No, sir. [97—41]

Q. I want to ask you again to see if you haven't refreshed your memory: Isn't it a fact that up to two years ago the Eldorado Mining Company delivered into Willow Creek continuously large volumes of water from Burnt Creek or Burnt River?

A. I don't know a thing about it.

Q. You don't? A. No, sir.

Q. If that is true—should it prove to be a fact, and that two years ago the Eldorado Mining Company ceased to operate that would that have any effect on Willow Creek drying up?

Mr. HUNTINGTON.—Objected to as incompetent,

(Testimony of John Norwood.)

immaterial and not proper cross-examination.

A. It probably would if they was to turn a big head of water down there.

Q. Referring to that statement you made on re-direct examination where you said you rented two pieces of land from the Eastern Oregon Land Company, a part of the land you rent from the Eastern Oregon Land Company is in Section 23, isn't it?

A. Yes, sir.

Q. And another portion is in Section 13?

A. I don't know just the number of the section. This is 13?

Q. Yes, sir. A. Yes, sir.

Q. How much land is there in thirteen?

A. Oh, probably 15 acres.

Q. You have 15 acres in Section 13?

A. 15 acres or something like that.

Q. And how much in Section 23?

A. Well, I don't know how much I had in there—sixty or seventy [98—42] acres.

Q. Didn't you rent all of Section 13?

A. No, sir; the lease calls for eighty acres in Section 13. There is a little piece in there and the rest runs out in the sand hills.

Q. Don't you rent all of Section 23 with the exception of about 80 acres?

A. I couldn't say as to that.

Q. Well, you know a gentleman by the name of Wells, your neighbor?

A. Yes, sir, I know him. He is not my neighbor.

Q. Well, he used to be?

(Testimony of John Norwood.)

A. Not when I was there.

Q. Well, he used to own a piece of land in Section 23?
A. Yes, sir.

Q. And does the property you have leased include that of Mr. Wells, that he used to own?

A. That is the piece; that is the meadow.

Q. Do you know the description of Wells' land?

A. Yes, sir.

Q. Give it.

A. It is the north half of the northeast quarter and the northeast quarter of the northwest quarter—three forties.

Re-redirect Examination of Mr. NORWOOD by Mr. HUNTINGTON.

Q. Do you mean to say that you lease of the Eastern Oregon Land Company any part of this land claimed by Mr. Wells?
A. No, sir. [99—43]

Q. The land in Section 23 which you lease of the Eastern Oregon Land Company is outside of the Wells tract?
A. Yes, sir.

Q. Do I understand that you do lease a part of the Wells tract?

A. Yes, sir, I have got the Wells place leased from Will R. King.

Re-recross-examination by Mr. HART.

Q. Then, in addition to this land which you were speaking of getting from Wells or from King you also lease other land from this company in Section 23?
A. Yes, sir.

Q. And you also have a piece of other property from the Company in Section 13?
A. Yes, sir.

(Testimony of John Norwood.)

Mr. HART.—I will ask to have struck out all of that portion of the witness' evidence pertaining to Section 13 because it embraces property not described in the complaint.

Re-re-redirect Examination by Mr. HUNTINGTON.

Q. Mr. Norwood, do you make any use whatever of the lands included in your leases from the Eastern Oregon Land Company outside of that overflowed land that is within the fence? [100—44]

Mr. HART.—Objected to as incompetent and immaterial as to what he makes use of, but what he leases.

A. No, sir.

Re-re-recross-examination by Mr. HART.

Q. You have some cattle, have you?

A. No, sir.

Q. Never did have any?

A. I had a milk cow once.

Q. Did she go dry like that dry well of yours?

A. Yes, sir.

Witness excused. [101—45]

[Testimony of W. J. Scott, for Complainant.]

W. J. SCOTT, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. You are a rancher, are you, on Willow Creek?

A. Yes, sir.

Q. You have lived on Willow Creek how many years? A. A little over thirty.

(Testimony of W. J. Scott.)

Q. What, if any, official position do you hold in the county? A. I am a county commissioner.

Q. How much land do you own and farm in Willow Creek Valley?

Judge WEBSTER.—Objected to as incompetent and immaterial.

A. Three hundred and sixty acres I own.

Q. Does Willow Creek run through that land?

A. A part of it, yes, sir.

Q. Is that land in one of the unsegregated tracts?

A. Why, it all joins together.

Q. Since you have lived on Willow Creek have you had occasion to observe the condition of the flood water in the creek during the different years?

A. Yes, sir.

Q. You may state what the general condition is as to the flood water in the creek. Take it from the first of January on until the first of April or May. What are the conditions?

A. Generally we have considerable water.

Q. From what source does that water come, if you know?

A. Of course, it comes from the adjoining hills around the [102—46] valley there, and as far as the Blue Mountains from the northwest course.

Q. From melting snows and rain?

A. Yes, sir.

Q. How long ordinarily does that flood water continue? Take it in the average season?

A. That varies a good deal. Certain seasons it will run up into June and run on down the river more

(Testimony of W. J. Scott.)

than we use; and others it don't.

Q. Take it in an average season about how long do you expect the flood waters are going to continue?

A. Up into June—the first of June.

Q. How long in that time would the water be overflowing the banks of the creek?

A. It overflows some there pretty much all the time in some places, and other places it don't run out.

Q. You mean that up to June there are places which would be inundated all the time?

A. Yes, sir.

Q. Take the lands which lie on a level with the banks of the creek. I am not now referring to depressions but lands situated in a general level of the valley, about how long are they inundated ordinary seasons? A. You mean flooded?

Q. Yes, sir, flooded.

A. Some of those meadows are flooded after the first of June; some places along the creek where the banks are deep they wouldn't be. There is very little flooded. In fact, the Wells meadow itself lays there and it overflows the banks pretty much all spring.

Q. What if any crop is produced on these overflowed lands? [103—47]

Mr. HART.—Objected to as incompetent and immaterial unless it is made applicable to the lands of the complainant.

A. They raise good crops when they overflow.

Q. What are the crops raised?

A. Wild hay generally.

Q. When there is no flood water coming down the valley in the spring what will these overflowed lands

(Testimony of W. J. Scott.)

produce if not irrigated by artificial means?

A. Not much, if anything, only pasture perhaps.

Q. What effect does the deprivation of the creek of the flood waters of the creek in the spring have upon the flow of water down opposite your place; that is, when there is no flood water in the spring, how about the flow of water in the channel of the creek opposite your place?

A. Well, there generally ain't much of any.

Q. What is your explanation of that?

A. You take along by my place there is deep cuts through there, and if those meadows floods from above this cut and fills full of water it seeps out through that cut for two or three months.

Q. That is, as I understand you, when the valley is flooded during the early part of the season, that the water during the later part of the season seeps back from those flooded lands into the bed of the creek and seeps back into your place? Is that your idea?

Mr. HART.—Objected to as leading.

A. Yes, sir, it extends the flow of water off from those meadows. [104—48]

Q. When there is no flood water in the spring in the valley what, if any, effect does its absence have upon the water supply generally through the valley? I mean now the supply to the wells along the valley?

Judge WEBSTER.—Objected to as irrelevant.

A. Well, there ain't so much water. We have to dig them deeper sometimes; some years like this one.

Q. Was there any flood water during the season

(Testimony of W. J. Scott.)
of 1908—or 1909?

A. 1908 I had all the water there was in the creek in my ditch, but 1909 in February for a little while, while the ground was froze it run by—the flood water.

Q. You mean to say that in 1908 you took during the flood season all the water out by your ditch?

A. Yes, sir.

Q. And did that leave the creek dry down below you during the season?

A. Practically dry; a little seepage.

Q. When do you begin to irrigate?

A. Just as quick as the water comes. As quick as the frost goes—about the 10th of February.

Q. And how long do you continue to irrigate?

A. As long as them fellows let me have water.

Q. Do you mean the people above you?

A. Yes, sir.

Q. Have you any water right yourself?

Mr. HART.—Objected to as incompetent, immaterial and not proper. [105—49]

A. I claim one.

Q. To what extent do you claim a water right?

Mr. HART.—Objected to as incompetent, immaterial and not proper.

Mr. HUNTINGTON.—Your objection may go to all this testimony.

A. I have been using about eight hundred inches of water.

Q. In what section and townships—in what sections and townships are your lands?

(Testimony of W. J. Scott.)

A. Sections 30, Township 16 S., R. 44 E., W. M.; Section 25, Tp. 16 S., R. 43 E., W. M.; Section 36, Tp. 16 S., R. 43 E., W. M.

Q. I understood you to say your land lay all in here?

A. It does. It joins all in a line.

Q. Then not all of your land lays in Township 16 S., R. 44?

A. No, sir; it crosses the line there.

Q. How much of it is in thirty-six?

A. Forty acres; the northeast of the northeast.

Q. How much of it is in Section 25?

A. I own the southeast quarter; 160 acres.

Q. And how much in Section 30?

A. 160 acres.

Q. What part of Section 30 do you own?

A. It is the west half of the southwest quarter there, and then I own the southeast quarter of the southwest quarter, and the southwest of the southeast, I think.

Q. How many seasons since you have lived on Willow Creek has there been a failure of flood water in the spring?

A. I don't know that there has been any, but one, but what [106—50] there has been some flood water

Q. How about last year and this year?

A. Well, there was a little flood water but I caught it, but this year the most of it went through to the river. I really know of one year the flood water didn't reach me, and that was in 1888 or '89; I never got a bit that year.

(Testimony of W. J. Scott.)

Q. How were the seasons of 1908 and 9 compared with the seasons immediately prior to that?

A. They were very dry; less water than usual.

Q. Well, now, what is the fact as to whether or not there is usually enough water coming down the valley in the Spring to overflow the banks of the creek most of the way?

A. Well, there has been most every year, excepting 1899, some of the banks overflowed—1889 I mean. That year I don't know of any of the banks being overflowed.

Q. How extensively were they overflowed during the years 1908 and 1909?

A. There wasn't many places I know of that it went out.

Q. In ordinary seasons when there is sufficient flood water to inundate the upper valley is there sufficient water flowing in the creek during the summer months through your place and below to furnish stock water and for domestic purposes along the creek?

A. Some seasons there is and some there is not.

Q. How was it during 1908 and 1909?

A. There is places above me that didn't have any water, but there is a deep cut down below me that had some seepage water.

Q. Even during those years? A. Yes, sir.

Q. But that water, as I understand it, wasn't a continuous flow [107—51] in the creek but simply deep holes?

A. Yes, sir, deep places.

(Testimony of W. J. Scott.)

Q. When there is an overflow of the valley how is it during the summer months as to the water in the creek?

A. Generally there is pretty plenty of water down in below and down in by Mr. Forkner's and down below there.

Q. Is Mr. Forkner's place down below you?

A. Yes, sir.

Mr. HART.—Objected to as to Mr. Forkner's place and also his property, as it is not property that is described in the complaint.

Cross-examination by Mr. HART.

Q. Mr. Scott, how many years did you say you lived up there?

A. A little over thirty years.

Q. What year was it you settled in there?

A. I settled in there in 1878.

Q. You have been living there ever since?

A. Yes, sir.

Q. You mentioned another gentleman down below you, Mr. Forkner. What year did he settle there?

A. He was there when I come.

Q. Mr. Forkner was there when you came?

A. Yes, sir. [108—52]

Q. I believe you also said you was County Commissioner? A. Yes, sir.

Q. As such you have last year had occasion to go over the county in various directions?

A. I have been around some; yes, sir.

Q. And have had to pay particular attention to the roads and that portion of the county up *Will*

(Testimony of W. J. Scott.)

River, or Creek, and on to your home in that direction? A. Yes, sir.

Q. Now, in 1908—09 those two years there was practically no flood water?

A. There wasn't much; no.

Q. Well, as we use the term "flood water" there was none?

A. There was, because what we had of it was all we got.

Q. You said you got it all in 1908?

A. Yes, sir.

Q. And the water in your ditch carried 800 inches at the most? A. Yes, sir.

Q. Was your ditch large enough to carry all of it?

A. It wasn't full.

Q. How full was it? A. Two-thirds.

Q. Five or six hundred inches?

A. No, sir.

Q. Five or six hundred inches don't make a flood? A. It was just a run-off.

Q. The creek was just a little raised but not enough to be flood water?

A. The snow melted, and that was about all.

Q. But still that would not be sufficient to make a flood down there in Willow Creek?

Q. It was what we call flood waters—the snow melting off.

Q. Well, every year there is more or less snow running off? [109—53]

A. Yes, sir, and makes flood water.

Q. Whenever the snow melts you mean that is

(Testimony of W. J. Scott.)

flood water? A. Yes, sir, surface water.

Q. That is what you have reference to as to that being flood water? A. Yes, sir.

Q. But at times you have seen Willow Creek when it arose every year and extended over quite an area in width, haven't you? A. Yes, sir.

Q. And that is what is generally known as flood water, and those in 1908 and 1909 didn't approximate that in any way?

A. Not as much as usual, no.

Q. You had five or six hundred inches of water in 1908 and '09, and in previous years there have been thousands and thousands of inches of water flow down Willow Creek at flood times, hasn't there?

A. Well, yes, sir.

Q. Well, did you observe last winter, during the months of December, and January, and February, the muddy condition of the roads and the ground leading from Vale up to your property and beyond?

A. Yes, sir, in February there was some mud.

Q. There was some mud in February?

A. Yes, sir.

Q. That wasn't caused by flood water and the rising of Willow Creek?

A. No, sir, it was caused by a little snow melting.

Q. It was caused by snow melting on the ground and by water falling upon the ground?

A. I have an idea it was, yes, sir.

Q. Well, pardon me, of course you know I wasn't there and I [110—54] am simply trying to get that information. In 1908 and '09 when there

(Testimony of W. J. Scott.)

wasn't flood water the ground was saturated with water so that it was muddy and numerous horses traveling through there got stuck?

A. Yes, sir.

Q. And you kindly entertained them when they stopped at your house as a good Samaritan should?

A. Yes, sir.

Q. When the ground is saturated it can hold no more water?

A. That could hold more water.

Q. When it was muddy?

A. It is only wet a foot deep.

Q. Don't you know that several wagons were stuck in the mud in the public highway, and the mud was more than a foot deep and you helped to pull them out?

A. I never helped to pull them out.

Q. You never saw them stuck?

A. I never saw them stuck.

Q. You knew of them being stuck?

A. Yes, sir.

Q. Off of the beaten road the mud was much deeper than that, wasn't it?

A. It generally gets soft.

Q. That condition generally occurs every year from the rains and snows?

A. Yes, sir, but I plowed dust up when I went to plow my field.

Q. Even though that occurred during the rainy season you plowed dust up when you plowed?

A. Yes, sir, in the spring I plowed down when it

(Testimony of W. J. Scott.)

wasn't wet deep enough to plow good.

Q. And the water went down into the earth?
[111—55]

A. I think it went up.

Q. You think it evaporated?

A. I don't think it went down.

Q. Why do you think the overflow water goes down instead of up? Is there any difference between them?

A. Well, those steep sidehills it generally floods and flows in the creek and causes this overflow.

Q. Why would the saturation of the ground by the overflow water go down any more than up?

A. I think it went down all right; it went down as far as there was enough to go.

Q. As a matter of fact there is considerable rainfall and snowfall every winter?

A. There is some winters.

Q. And the earth becomes so saturated with it that it becomes very muddy and heavy?

A. At times.

Q. And it does that without the intervention of flood water?

A. When it is that wet we generally have flood water.

Q. Well, did they have flood water up where you spoke of seeing it muddy this year—1909, you just told us about. There was no flood water there then?

A. Yes, sir.

Q. You had it all in your ditch?

A. Not in 1909.

(Testimony of W. J. Scott.)

Q. In 1908 you had it all in your ditch? It didn't make the county road and highways muddy?

A. It didn't make it very muddy, just a little sloppy was all.

Q. You have a suit also pending against this company at the present time?

A. Not that I know of. I tried to get one but I didn't make it. [112—56]

Q. You admitted in your case that the flood water they held up didn't come anywhere near your place anyway?

A. No.

Q. Didn't you admit it didn't damage you?

A. I admitted if they did turn it away it wouldn't get to me. They had a little stuff up there in their ditch and the neighbors would take it before it got to me.

Q. You admitted that if they did turn the water loose it would not get to you?

A. That is all.

Q. Have you any wells on your property?

A. Yes, sir.

Q. Did they go dry this year?

A. No, had to dig them deeper.

Q. Did they go dry last year?

A. Yes, sir.

Q. Did they go dry the year before?

A. No, sir.

Q. Last year there was but little fall, comparatively little fall of water or snow either in the valley or on the mountains as compared with previous years, isn't that true?

A. Yes, sir.

Q. That is also true of this year?

(Testimony of W. J. Scott.)

A. Yes, sir.

Q. Can you say whether the wells which you dug are fed by underground streams which may have their source in the mountains?

A. It is on the level with our water in the creek.

Q. I did not ask that question. Can you say the water in your wells doesn't come from underground streams that may have their source up in the mountains? A. I couldn't say. [113—57]

Q. And if there was no snow in the mountains, or rains, the streams naturally wouldn't have been fed and that would make your water short, wouldn't it?

A. Yes, sir.

Q. About what season in the year does the big floods usually come?

A. February and March.

Q. The big floods usually come in February and March. Now, the volume of water coming down there at that time simply sweeps on past on its way to the ocean? A. Some years it does.

Q. And it remains about how long on an average?

A. Generally about June.

Q. You mean that some portion of it is still left as long as June?

A. Yes, sir, some goes into this river the first of June and some years it don't.

Q. In the lowlands, that portion of the ground where the river banks—where the land is practically level with the river bank the water would be over that up to June? A. Sometimes it would.

Q. And even that kind of ground sometimes it

(Testimony of W. J. Scott.)

doesn't remain so long. Where the soil is practically level with the river bank during some years it does not remain up as long as June?

A. No, sir.

Q. You are familiar with the Eldorado Mining ditch? A. Yes, sir.

Q. It has been delivering for years water from Burnt Creek into Willow Creek, hasn't it?

Mr. HUNTINGTON.—That is subject to our objection. [114—58]

A. Yes, sir.

Q. Above your property? A. Yes, sir.

Q. And the water so delivered would consequently flow on down towards or past your property? A. It would be towards it, I think.

Q. Owing to what other waters are in the creek as to how far down it got? A. Yes, sir.

Q. This Eldorado Mining Company ditch has been delivering water into Willow Creek up until 1908?

A. Well, it has been running. I don't know whether it has been turned out or not.

Q. You know the portion of the flume of the Mining Company was destroyed in the middle part of 1908 and delivered no water down here since?

A. I don't know that.

Q. You know the amount of water it was in the habit of delivering to Willow Creek?

A. Well, I don't —

Q. I am simply asking if you know the amount of water approximately?

(Testimony of W. J. Scott.)

A. About three or four hundred inches I should think from the looks of the ditch.

Q. I will ask you if at times it would not be as high as twelve or 1500 inches?

A. I have seen it that way.

Q. You have not seen it delivering water in the years 1908 and 1909? A. No, sir.

Q. And the shortage of water has occurred during the seasons of [115—59] 1908 and '09?

A. Those last two years were dry years.

Redirect Examination by Mr. HUNTINGTON.

Q. Have you been up there where the Eldorado ditch is during the last three or four years?

A. No, sir.

Q. So that you don't know anything about the conditions there? A. No, sir.

Q. How long since is it that you were there at the Eldorado ditch?

A. I think it has been five or six years since I have been there.

Q. You stated that last year you had to dig your well deeper. Was that on account of the shortage of water in it? A. Yes, sir.

Q. How much deeper did you go?

A. I dug one down about four feet and the other three.

Q. How is the water in those wells up to this time this year?

A. They seem to be holding out pretty well.

Q. Better than they did last year?

A. I think so.

(Testimony of W. J. Scott.)

Q. How deep are they now?

A. They are about twenty-one feet.

Q. They are about 21 feet in all? [116—60]

A. Yes, sir.

Q. Do your wells extend down into the gravel-bed? A. Yes, sir.

Q. How deep?

A. I think two or three feet or something like that.

Q. Then, prior to last year you hadn't got down into the gravel?

A. No. One well had been there a good many years and I never had to dig it down until last year.

Q. What is the fact as to there being occasional flood water in Willow Creek valley during the summer months? Do you ever have them?

A. I have seen them have them.

Q. What were they due to?

A. To heavy rains and waterspouts.

Q. Are they of frequent occurrence or rare?

Mr. HART.—Objected to as incompetent and immaterial. You are claiming rights to waterspouts, are you?

Mr. HUNTINGTON.—We are claiming every bit of flood water.

Q. Are they of frequent or rare occurrence?

A. They have been rare of late years, but in 1884 the creek about the 6th of June, 1884, there was practically no water at my place, or very little, and there come a waterspout and it rained for quite a while and it run all over that country; all over the meadows

(Testimony of W. J. Scott.)

and everywhere else.

Q. That was in 1884? A. Yes, sir. [117—61]

Recross-examination by Mr. HART.

Q. Was there a rain at that time, in 1884?

A. Yes, sir, a waterspout.

Q. Rain just fell every place?

A. Yes, sir, all over the country.

Q. And the ground was plenty wet without any waterspout?

A. It wasn't at that time, when it come. It come on the 9th day of June.

Q. The rain made the ground wet without the assistance of the waterspout?

A. It started in and I had a crop of grain and it took it all. It kept falling all around.

Q. There was plenty of rain that year?

A. Yes, sir.

Re-redirect Examination by Mr. HUNTINGTON.

Q. You were asked on cross-examination about the saturation of the ground from the moisture that fell in the spring of 1909. Now, when the land is flooded; that is, when the water overflows it and stands upon it for some little time, what is the effect upon the soil as to saturating it, if any?

Mr. HART.—Objected to as not proper re-redirect examination, [118—62] incompetent and immaterial.

Q. Do you mean by that it would be wet to a depth? A. Yes, sir.

Q. Would there be any plowing up of dust on

(Testimony of W. J. Scott.)

lands thus wet? A. No, sir.

Re-recross-examination by Mr. HART.

Q. Well, if the ground is not wet long enough the chances are the plow would throw up dust when it was plowed? A. I think it would, yes, sir.

Q. You mentioned awhile ago, Mr. Scott (and I should have asked this question before, Mr. Huntington, if you will pardon me), you mentioned awhile ago you got water when the people above you let you have water. Do you mean by that the people who had a prior right to the water above you used it?

A. No, sir, because above me the first people had it and took it away. They beat all the prior rights, when they are up the stream on you.

Q. The people up above you took it away from you just like you took it away in your ditch from the people below you? A. Yes, sir, just the same.

Q. They didn't have any more consideration for you than you had for the people below you, did they?

A. Just the same.

Q. You know there are a lot of persons living above that have [119—63] had water rights and ranches they have been using water upon?

A. Yes, sir.

Q. And you know that some of the property that has been watered for years is a part and parcel of this defendant company?

A. Some of it is.

Q. The same property. And they are using the same water upon it now?

A. Yes, sir, taken all there is; that is what they

(Testimony of W. J. Scott.)

have always done.

Q. Just the same as you was trying to do to your lower neighbors? A. Yes, sir.

Re-re-redirect Examination by Mr. HUNTINGTON.

Q. Do you mean to say the Eastern Oregon Land Company has ditches above you?

A. No. I mean the Brogan people, who bought that land up there.

Q. Do you know whether they are taking any more water now than they have been during the years past, referring now to the defendant company, the people taking water under them?

Mr. HART.—Objected to as not the best evidence.

A. They stored up flood waters there last spring and kept running what is called Pole Creek and are now using it on land. [120—64]

Mr. HART.—Objected to as incompetent, also because it pertains to Pole Creek and whatever rights we have there, and relating to matters entirely outside of this case.

A. They stored up the Pole Creek water and they are using that on some of the land they used to use it on and I think 100 acres or more—I think 120 or 180 acres of new land.

Q. Is Pole Creek a tributary to Willow Creek?

A. Yes, sir, it is the main tributary in this valley.

Q. I think you referred in your testimony to a company ditch, if I understood you rightly. What ditch—what company ditch do you refer to as “company ditch”?

A. I don't recollect referring to any.

(Testimony of W. J. Scott.)

Q. Perhaps I am mistaken about that. Is there a ditch known as the "company ditch"?

A. Yes, sir.

Q. What company is that?

Mr. HART.—Objected to as not proper redirect examination and irrelevant.

A. I don't know exactly what they call it. It is a lot of farmers there who have got a ditch there.

Q. Is that above yours? A. Yes, sir.

Q. How many ditches are there on the creek above your place that take water out?

Mr. HART.—Objected to as incompetent and irrelevant. [121—65]

A. I couldn't tell you. There are a good many of them.

Q. Can you not give us an estimate of the number?

A. That question would lead me plumb to the head of the ditch, some fifty or sixty miles.

Q. Well, from your place up to the Cole place, then? A. Above my ditch?

Judge WEBSTER.—Objected to as incompetent and irrelevant.

Q. Yes, sir. A. Eight or nine, I think.

Q. Do you know whether there are any on the creek below your place that take water out?

A. Yes, sir.

Q. How many are there?

Mr. HART.—Objected to as immaterial.

A. Five or six.

Q. That is all.

(Testimony of W. J. Scott.)

Re-re-recross examination by Mr. HART.

Q. This farmers' ditch you speak about has been located there for thirty years and has been used ever since? A. Yes, sir.

Q. That is the "company ditch" you spoke about? A. Yes, sir. [122—66]

Q. They use that for irrigation and drainage both, do they not?

A. Well, I don't know. They have always irrigated when I seen it, and sometimes they didn't have any water for that.

Q. When you saw it they were always using it for irrigation and sometimes they didn't have water for that? A. Yes, sir.

Q. These other ditches above yours, they have been in existence for thirty years?

A. Some of them have.

Q. You mean above your ditch and below Cole's?

A. I meant including Cole's.

Q. Haven't they been in existence for thirty years and more?

A. Some of them have and some of them haven't.

Q. They have all been in existence for more than fifteen years? A. No, sir.

Q. How many of them have been in existence for a less period of time than fifteen years?

A. Well, there is that new ditch the company has built up there this summer.

Q. Not including the ditches of the defendant company?

A. Then, there is another ditch that has been

(Testimony of W. J. Scott.)

built up there through Kelly and Derrick field some few years ago.

Q. Well, with the exception of the ditch which the defendant company may have built, and the ditch you speak of going through Kelly's place, all the rest have been in existence for at least fifteen years?

A. There is another ditch there they took out *that hasn't too*.

Q. When did they take that out?

A. Less than ten years ago.

Q. When was the Kelly ditch taken out?

A. Less than ten years ago. [123—67]

Q. And with the exception of those two and whatever ditch the defendant company may have, the others have all been there for different years?

A. Yes, sir.

Q. In fact, all the water of Willow Creek has been appropriated for thirty years?

A. Well, at times.

Q. If the companies of the various ditches had sufficient water to supply them according to the amount which they have appropriated, why it would be more water than annually goes down Willow Creek at flood times or all other times?

A. No, sir.

Q. Counsel asked you if there were any ditches constructed by the Eastern Oregon Land Company.

A. They don't claim any.

Q. They never built any?

A. Not that I know of.

(Testimony of W. J. Scott.)

Q. Have they ever, during the thirty years you lived there attempted to improve or farm any of the property they had on Willow Creek?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant immaterial and not proper cross-examination.

A. Not that I know of.

Q. You have been living up there and if they had done any work you would know it?

A. I think I would.

Q. Don't you know whether they have ever done any work there to improve any land which they had up in the valley?

A. I never knew them to.

Q. And they never cultivated any land? [124—68]

A. I never knew them to.

Q. They never attempted to improve any of the land or use any of the water?

A. No, sir, just the flood water that runs over their land is all I ever saw.

Q. They just run as nature let them run. That is what you wish to say? A. Yes, sir.

Re-re-re-redirect Examination by Mr.
HUNTINGTON.

Q. The Eastern Oregon Land Company has never attempted to interfere with the rights of any other people along Willow Creek with respect to the use of the water?

Mr. HART.—Objected to as incompetent.

Q. And they have allowed the rights of water for

(Testimony of W. J. Scott.)

people who wanted to build ditches across their land to irrigate their lands, haven't they?

Mr. HART.—Objected to as not the best evidence and irrelevant.

Q. They have been building ditches across their land ever since I have been there and I never heard of any objections. [125—69]

Q. Isn't it true, Mr. Scott, that the tenants who have occupied the lands of the Eastern Oregon Land Company across the valley have placed improvements upon some of these lands?

Mr. HART.—Objected to as incompetent, and not the best evidence. They settled a good many of them on their land and had it fenced when they commenced to lease it.

Q. New meadows have been cleared up on some of the places by the tenants? A. Yes, sir.

Re-re-re-recross-examination by Mr. HART.

Q. In other words these improvements you speak about have been made by settlers who settled on the land and afterward the company took the land away from them? A. They leased it to them.

Q. After they took it from them?

A. They leased it to them.

Q. Haven't you heard of a good many lawsuits about that land, different people claiming the land?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

Mr. HART.—I will withdraw that question. [126—70]

(Testimony of Lawrence Faulkner.)

At the hour of 5:30 o'clock P. M., July 21st, 1909, adjourned until 7:00 o'clock P. M., to-night.

At the hour of 7:00 o'clock P. M., July 21st, 1909, met pursuant to adjournment as above. Present: Same as before.

**[Testimony of Lawrence Faulkner, for
Complainant.]**

LAWRENCE FAULKNER, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. You reside in Willow Creek Valley?

A. Yes, sir.

Q. How long have you lived there?

A. Wait until I figure now. Since 1871.

Q. Does the stream of Willow Creek flow through your land? A. It does.

Q. Are you acquainted with the condition of the stream and the flow of the water in it from year to year? A. From year to year, yes, sir.

Q. What is the fact as to the flow of water in the creek during the early part of the year from January down to the first of April or May in ordinary years?

A. Well, we have high water there for a couple of months, what I call high water. It flows over the valley.

Q. Does that high water flood portions of the land along the [127—71] valley?

A. Yes, sir.

Q. About how long does that flood water in ordi-

(Testimony of Lawrence Faulkner.)

nary seasons stand over the bottom land along the creek?

A. It might stand twenty days or thirty days, just according to the flood. Twenty days is about the average or maybe less.

Q. Those lands which are thus overflowed and inundated every year are they productive of any crop? A. They are.

Q. What is it?

A. Generally—well, in fact, hay is the principal crop.

Q. When the floods don't overflow these lands in the spring what, if anything, do they produce?

A. Nothing but sagebrush.

Q. What effect does the overflowing of the lands along the creek have upon the flow of water in the stream of the creek after the overflowing of the lands has receded?

A. Well, generally that is seepage.

Q. When there has been no flooding of the lands in the valley by this spring overflows what is the condition of the flow of water in the creek, say down opposite your place? A. I don't understand.

Q. When there has been no flooding of the land in the spring what is the condition of the water in the creek opposite your place?

A. Why, there is none to amount to anything. Maybe there is some seepage; maybe 15 or 20 inches.

Q. Take it along in the month of July, say, when the usual spring floods have overflowed the valley,

(Testimony of Lawrence Faulkner.)

will you still get some flow of water in the creek?

[128—72]

A. Undoubtedly, but not to amount to anything.

Q. When you have no such overflowing in the spring do you get any as late as July?

A. No.

Q. What is the effect upon the lands in the valley in respect to the supply of water to wells along the valley when there has been no flooding of water in the spring?

Mr. HART.—Same objection as alleged to similar questions and as outside of the issues in this case, involving lands not mentioned in the complaint.

A. Well, of course, the water is lower.

Q. Than when they have the spring floods?

A. Well, yes, sir.

Q. Were you living on your ranch during the season of 1908? A. I was.

Q. And this year also? A. Yes, sir.

Q. What is the fact as to whether there was any overflowing of the valley last year or this year?

A. There was none at all.

Q. Were there any hay crops on these overflowed lands last year or this year? I mean lands that are not irrigated by artificial irrigation but are irrigated only by the overflow?

Mr. HART.—Objected to as incompetent unless the lands are those mentioned in the complaint.

A. I don't believe there was any crops. [129—73]

Q. Would that answer apply generally to the

(Testimony of Lawrence Faulkner.)

lands along the creek bottom that are overflowed?

A. I believe it will.

Cross-examination by Mr. HART.

Q. You say there was no overflow at all in the year 1908? A. This last spring?

Q. A year ago this spring?

A. Nothing at my place.

Q. There was no overflow at your place a year ago last spring? A. No, sir.

Q. Well, is your place above or below Mr. Scott's?

A. It is about two miles south of Scott's.

Q. Two miles this side of Mr. Scott's?

A. Yes, sir.

Q. And you saw no overflow this spring?

A. Nothing I would call an overflow.

Q. You did see, though, the creek rise a few times did you through the winter?

A. Just once it raised there for about 24 hours. I mean it run off in 24 hours.

Q. The overflow run off in 24 hours?

A. Yes, sir.

Q. Well, it didn't raise very high during that time? A. Oh, no. [130—74]

Q. But in 1907, two years ago, there was quite a flood, wasn't there?

A. I don't remember; there might have been.

Q. Can't you remember that far?

A. Two years ago?

Q. Yes, sir, the spring of 1907.

A. Yes, sir, there was a flood then.

(Testimony of Lawrence Faulkner.)

Q. Then, the water covered over some of the property in the valley which ordinarily isn't covered?

A. Well, no, I don't suppose it did.

Q. Did it then?

A. It covered some of it.

Q. Well, every year all up and down through this valley there is more or less rain and snow, isn't there?

A. Undoubtedly, yes, sir.

Q. Well, there was snow and rainfall last year, wasn't there, through November and December and January and February, and March, and April of this present year? A. None fell in April.

Q. Didn't some rainfall in April?

A. Not out to my place.

Q. Didn't it in May?

A. No, sir. It ain't rained for ninety days this summer.

Q. Well, did you have any in March then?

A. I couldn't swear to that.

Q. You couldn't remember that?

A. Yes, sir, we had some in March.

Q. And in February? A. Yes, sir.

Q. You had some in January?

A. I couldn't remember. [131—75]

Q. You had enough rain to make all the hillsides and roads muddy? A. Yes, sir.

Q. You have had every year, haven't you?

A. Yes, sir.

Q. And it saturates the earth with water and that is the way it makes the mud?

A. That is the way they do make mud.

(Testimony of Lawrence Faulkner.)

Q. And that is the way it makes mud in that valley? A. Yes, sir; you are right.

Q. When it is saturated it doesn't make any difference whether it is flood water or rain water?

A. It has to get water, on it.

Q. And water falls from the sky in the shape of rain or snow and that is what does it?

A. Sometimes.

Q. Every year you have seen people stalled in the mud—every year?

A. They had too much of a load on.

Q. You didn't see them stalled when there was no mud? A. Only when they broke down.

Q. And you have seen them stalled when they tried to get off the county road through the months of January and February every year over lands that were never flooded?

A. I saw them this spring but they were too heavily loaded.

Q. Were they on the county road or off the county road?

A. I couldn't tell where it was.

Q. Do you mean to say you couldn't tell where the tracks of the county road was? You can tell where people had driven? A. I can. [132—

76]

Q. Well, those places, irrespective of where the wagons were driven, they got stalled?

A. The frost got out and let them down.

Q. You are sure of that?

A. I am sure of it.

(Testimony of Lawrence Faulkner.)

Q. The frost means nothing more nor less than frozen ground with water in it?

A. You are right.

Q. And then when it thawed, consequently it made mud and let them down?

A. Yes, sir, indeed.

Q. And that ground would be frozen and there would be water in it where it could freeze, in places where it was never flooded?

A. There would have to be overflow to get the water to freeze.

Q. Couldn't it come from rain?

A. It might sometimes.

Q. Sometimes if it rains long enough it sinks down? A. Sometimes.

Q. And it freezes, too, doesn't it?

A. Yes, sir, it freezes.

Q. Now, Mr. Faulkner, let us get the fact about this earth being saturated with water. It comes from rain and snow that falls on it and that saturates it every year? When you have plenty of rain it makes mud? And more water?

A. When anybody has pumps and hose it saturates it.

Q. I am not talking about pumps and hose, I am talking about the rain. It rains and snows every year. A. It falls every year.

Q. That is true, isn't it?

A. I don't know. [133—77]

Q. You have seen it done every year?

A. I have.

(Testimony of Lawrence Faulkner.)

Q. And where there was plenty of rain it did it?

A. It does.

Q. And you say it does this present year, 1909—that you have seen wagons stalled every year?

A. They stalled near my place.

Q. You said also that last year, or this last winter, was a dry winter, didn't you? A. I did.

Q. And if there wasn't sufficient water to saturate it this year it was worse than other years?

A. It had to come to us in other years.

Q. You have seen it worse in other years?

A. I did.

Q. And in those years you have seen enough rain fall in those years directly down on the ground to make it wet—snow and rain enough to saturate it so you would have to have a boat? A. Yes, sir.

Q. Those wet years where you used the boat?

A. That was the overflow that caused the boat.

Q. But you told us also the ground was wet and saturated, irrespective of the overflow, by the rain and snow just now? A. A few minutes ago.

Q. That was true, wasn't it, Mr. Faulkner?

A. That is true.

Q. That is all there is to that, then, if the ground was saturated with rain and snow it didn't need any other overflow? A. It was overflowed.

Q. If it was made wet by rain and snow then it didn't need [134—78] any overflow to make it wet?

A. That is what makes the overflow—rain and snow.

(Testimony of Lawrence Faulkner.)

Q. The rain and snow makes the overflow?

A. Yes, sir. Do you mean all the rain and snow falls on the road where they stalled—do you mean all the rain stops on this road?

Q. No, I don't mean all the rain and snow stops on the road, but I understood you to say the rain falls all up the valley?

A. The rains fall generally on the hills and mountains.

Q. Doesn't it fall in the valley?

A. Yes, sir.

Q. And doesn't the snow fall in the valley?

A. Sometimes.

Q. Didn't it do so last year?

A. I don't remember.

Q. Wasn't it so the year before?

A. I can't remember.

Q. I will ask you if last year there wasn't a heavy snowfall, and it lay on the ground for several weeks, and the year before all in the valley and on both sides and in the hills?

A. Well, those on the west side have snow until May.

Q. Well, the snow that fell in the valley, that didn't make the overflow? A. No.

Q. But it did wet the ground it was over when it would melt? A. It did.

Q. The flood water you mention, you say when the floods come they stay on the ground how long?

A. Oh, about twenty days, or less.

(Testimony of Lawrence Faulkner.)

Q. And sometimes it don't lay so long? [135—
79]

A. No, it is generally run off before this.

Q. It generally runs off before this time?

A. Yes, sir.

Q. It does damage to some of the property,
doesn't it? A. No.

Q. Did you ever know of the overflow doing any
damage up in the valley?

A. I don't know that it has ever done any harm.
I never thought it did.

Q. It brings down at times a lot of slime and
stuff from the mountains?

A. I never thought it done any harm to my place.

Q. Have you been talking about your place all
the time? A. I have.

Q. And that is all you have been talking about?

A. Yes, sir.

Q. And you don't care about any place else?

A. No, sir.

Q. Don't you know that the overflow water does
damage all along the valley at times?

A. I would like to know where it does it.

Q. Haven't you *know* of the flood water bring-
ing down debris and muck from the mines away up
the valley and the creek and depositing it on the
ground? A. Yes, sir.

Q. That does an injury to the property by the
overflow?

A. It helps it in some places. It levels off the
surface of the ground.

(Testimony of Lawrence Faulkner.)

Q. It levels it off? A. Yes, sir.

Q. Then, is there any portion of your property that is subject annually to overflow? [136—80]

A. There is.

Q. How many acres have you got?

A. Something over two hundred.

Q. You have something over 200 acres?

A. Yes, sir.

Q. How long have you been living on this place?

A. Oh, some—oh, about close on forty years—1871, and I made my home there since.

Q. You have been there nearly forty years?

A. Yes, sir. I have been living *of* there at times.

Q. You said you had 200 acres?

A. Two hundred acres and a fraction.

Q. Can you give a description of that land of yours? A. Yes, sir, nearly.

Q. What is it?

A. Section 5, Township 17, Range 44 East.

Q. What subdivisions of Section 5 do you have?

A. I disremember now. It is nearly in the form of an "L."

Q. But you don't recall the subdivisions?

A. No. I can't recall them now to memory. It is marked here.

Q. You know, do you not, Mr. Faulkner, that all of the water of Willow River or Creek has been appropriated for years, too, by upper appropriators, don't you? A. No, sir.

Q. Well, hasn't it been appropriated?

A. It has.

(Testimony of Lawrence Faulkner.)

Q. By persons most of them living above you?

A. No, I think I am the first man who ever took up the water rights.

Q. I didn't have reference to the time you took up your water rights; I mean the people above you?

[137—81]

A. They live up the stream just like—they take it all, that is all they hang it by.

Q. And they have been using it above you for thirty years?

A. Yes, sir, more than thirty years.

Q. And they have been irrigating land up the valley that was bordering on or in the vicinity of Willow Creek?

A. They have.

Q. And that is the same land the defendant company owns and they are using water on?

A. I don't know.

Q. You know the Emory Cole property?

A. I do.

Q. He has used the water for more than thirty years?

A. Not the way he has used it this year.

Q. He has used the water of Willow Creek on his property for more than thirty years?

A. He never used it up on his high land before.

Q. It has been a portion of his land that it has been used on before, hasn't it?

A. Well, I don't know exactly. I couldn't answer that question.

Q. A part of this land borders on Willow Creek?

A. All of it does, except what is up in the hills.

(Testimony of Lawrence Faulkner.)

Q. And this land you speak of up in the hills borders on that lower down, doesn't it?

A. It all borders down to the property for two miles.

Q. It is all together—one piece?

A. Yes, sir, as near as I can recollect.

Q. Do you know where Gum Creek is?

A. Yes, sir, I do.

Q. And also where Sheep Corral Gulch is and the creek that [138—82] runs down that?

A. Yes, sir.

Q. And Turner Gulch? A. Yes, sir.

Q. And Little Willow Creek? A. Yes, sir.

Q. Current Creek?

A. I don't know where that creek is?

Q. You don't know where Current Creek is up there? A. Yes, sir, I do.

Q. All of these creeks have their source up in the mountain sides as you go up the valley, on the left-hand side as you go up? A. Yes, sir.

Q. And all on this side of Emory Cole's property? A. Yes, sir.

Q. And when the snow and rain falls in the vicinity of where this snow lays that all goes into Willow Creek?

A. It would have to go in there.

Q. And it does go into there? A. Yes, sir.

Q. Now, if all those creeks that I have mentioned had any water in them in the last year or two it was an extra supply?

A. I really don't know. They may have had a

(Testimony of Lawrence Faulkner.)

little extra water.

Q. This last year? A. They might.

Q. Over on the other side of Willow Creek as you go up the valley there is Fox Creek. You know where that is? A. That is away up near Cole's.

[139—83]

Q. It is on this side of Cole's, though, isn't it?

A. Yes, sir.

Q. And you have also the creek in Road Canyon?

A. There is no creek.

Q. Isn't there a gulch there in the canyon, and doesn't water run down there?

A. There is no snow up there.

Q. You know Baker's Creek, then?

A. I do.

Q. It flows into Willow Creek?

A. Yes, sir, that is still farther up above Cole's.

Q. I know that it is. Do you know where the dam location of the defendant company is, where the location of the dam is that the defendant company is building?

Mr. HUNTINGTON.—This is all objected to as not proper cross-examination.

Q. Well, do you know where the defendant company is putting in the dam in the canyon above Cole's place?

A. I believe I do. I think I do.

Q. You know the old mining claims up there?

A. Yes, sir.

Q. Do you remember those mining claims?

Mr. HUNTINGTON.—Objected to as not proper

(Testimony of Lawrence Faulkner.)

cross-examination.

Q. They have been mined for the last thirty or forty years, off and on, haven't they? [140—84]

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. Yes, sir, they were mining there in 1872.

Q. Do you know whether they were not mined in 1862? A. No.

Q. You have not that knowledge; that was before you came there? A. That was before I came.

Q. And it is where those old mines were—how long have you known Emory Cole—or Leonard Cole, operating that mining ground?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. I don't know how long they did mine there.

Q. Will you say he has not been mining there himself for fifteen years?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. I don't know what year he did mine there.

Q. I know, but about your best memory is all?

A. Well, I couldn't swear what year he mined, or at all in fact—I don't know whether he worked there. His partner worked there.

Q. Mr. Insenhofer.

A. I believe he did one winter, but I don't know what year it was.

Q. But you do know those properties have been mined for gold [141—85] for the last forty years—since 1872?

(Testimony of Lawrence Faulkner.)

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. In 1873 they abandoned it.

Q. Who was the man that owned it then and abandoned it?

A. I couldn't tell. He was a Chicago man—Clayton, I believe, was his name.

Q. Didn't they sell it out and then it was mined by new people?

A. No new people ever worked it. Nobody ever worked it after they left.

Q. How long did Mr. Cole and Mr. Insenhofer work it? A. A year or two.

Q. Don't you know that Mr. Cole and Mr. Insenhofer worked it for the last fifteen years and have the records in the courthouse here?

A. I never saw them.

Q. If they were working it and had the records here you don't know of it then?

A. No.

Q. This Baker Creek flows into Willow Creek this side of that mining property, doesn't it?

A. Why, of course, yes, sir.

Q. Of course it does. Then a dam constructed from the mining property wouldn't interfere with the flowage of the water through Baker Creek?

A. No, it would have to raise it very high.

Q. They don't do that? A. No, sir.

Q. Can you tell me the area in square miles of the land, including [142—86] the mountain sides and hills, and all the rest that is drained by this list of

(Testimony of Lawrence Faulkner.)

creeks that I read off to you?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. I don't know which creeks—

Q. Gum Creek, Sheep Corral Gulch, Little Willow Creek, Baker Creek, Fox Creek and Road Canyon?

A. It takes a mathematician; I couldn't tell.

Q. But do you know and are willing to say that snow and rain falls around and in the vicinity of where those creeks have their source?

A. That is where the snow falls.

Q. How many wells have you got on your place?

A. I have got one well.

Q. Has it gone dry this year?

A. I couldn't tell; I have a pipe there—just a pipe.

Q. You get water out of it? A. Yes, sir.

Q. Did it go dry last year?

A. Well, I kept hammering the pipe of the well.

Q. You got water out of it?

A. Yes, sir. It never went dry. It kept getting lower and I kept hammering on it and I would get water.

Q. How deep have you got it down?

A. It must be fifteen or twenty feet.

Q. Is that the only source of water supply you have on your ranch?

A. Oh, I have got springs on it.

Q. You have some springs on your ranch also?

[143—87] A. Yes, sir.

(Testimony of Lawrence Faulkner.)

Q. How far away from the creek-bed is the spring? A. Well, it is in the creek-bed.

Q. The spring is in the creek-bed?

A. Yes, sir.

Q. Is it running now? A. No, not much.

Q. Well, is there any water coming out of it?

A. No, none came out of it the last week it dried up considerable.

Q. How long has it been since you saw it?

A. This morning.

Q. Was there any water in it this morning? Was it running? A. No, sir, it was standing there.

Q. Did it dry up last year?

A. No, sir, it was standing there.

Q. It didn't dry up last year? A. No, sir.

Q. Have you any other source of water supply?

A. No, only what comes through Scott's place and flows in there.

Q. Some comes in from Scott's place onto your place?

A. Yes, sir, a little seepage comes in there. There is a spring there I get a little from there but it don't run down.

Q. How many springs has Mr. Scott got on his property?

A. I don't believe he has got a spring on the ranch.

Q. I thought you said he had a spring on his ranch.

A. No,—well, yes, sir, in the creek, but it doesn't

(Testimony of Lawrence Faulkner.)

do Scott any good.

Q. Well, they are on his place? [144—88]

A. They are on his land, yes, sir.

Q. They are probably fed from underground streams that have their source up in the mountains?

A. I don't believe they come from the mountains. I think they come from the valley here.

Q. You don't think they come from the mountains?

A. I think not. The fact of the matter is, Willow Creek any time you get to gravel you get water.

Q. In Willow Creek? A. Yes, sir.

Q. Well, 15 feet. Is that down as far as you have your pipe? It is not very deep. A. No.

Q. Getting water is very easy in all of these places? A. It is on my place in ten feet.

Q. On all those places?

A. The farther down you go the better the water.

Q. It is colder and nicer? A. Yes, sir.

Q. You never run out if you go down ten feet or more? A. No.

Q. And that is true all through the valley so far as you know? A. Yes, sir. [145—89]

Redirect Examination by Mr. HUNTINGTON.

Q. You think, Mr. Faulkner, that these creeks that the counsel has asked you about, and concerning which he has made you his witness, flow into Willow Creek any considerable amount of water at any time in the year?

Mr. HART.—Objected to as incompetent and because it is an assumption of something counsel did

(Testimony of Lawrence Faulkner.)

not speak of, as I have not made him a witness for the defense.

A. In the spring of the year they run a few days or a few weeks.

Q. How does the water supply coming from those creeks compare to the water supply that comes down the main channel of Willow Creek in the canyon?

A. They don't cut no figure much, those streams.

Q. As compared with the main channel of Willow Creek coming through the canyon they cut no figure? A. No.

Q. Those streams he has asked you about head on the lower hills, do they not?

A. Yes, sir, they head on the lower hills.

Q. And they drain a comparatively small area?

A. They have nothing but surface water they collect coming down.

Q. And, as I understand you, they run very rarely?

A. They run rarely and run through a sand country and gravel country and it sinks. [146—90]

Q. Counsel has asked you, on cross-examination, about the saturation of the ground by rain and snow. Does the rain and snow in the valley ordinarily wet down the earth to a very great depth?

A. Oh, no.

Q. That is simply a surface wetting?

A. Yes, sir.

Q. But the water that overflows the ground stands upon it, does that wet the earth down?

A. It does.

(Testimony of Lawrence Faulkner.)

Q. Is there a difference in the vegetation that grows upon these lands that are overflowed from the other lands that are not overflowed?

A. Well, yes, sir.

Q. What grows upon the lands which are not overflowed? A. Nothing but sagebrush.

Q. And on the lands that are overflowed there is a growth of grass?

A. There is a growth of grass on the overflowed lands.

Q. The rain and the snow fall on the lands that produce sagebrush just the same as on the other lands, do they not? A. Yes, sir.

Q. And about this mining business, concerning which counsel has asked you. Isn't it true, Mr. Faulkner, that Boswell abandoned the claims up there?

A. I couldn't swear whether Boswell owns them or not.

Q. Did Boswell mine there?

A. He had a mine on Mormon Basin Creek. He abandoned that.

Q. Now, this man (C) Layton that came out from Chicago. How long was he there?

A. He worked there a few years. [147—91]

Q. What became of him? Did he leave?

A. He abandoned it.

Q. Was anybody there after Layton abandoned it until Cole went there, so far as you know?

A. No.

Q. Do you know about how many years there was

(Testimony of Lawrence Faulkner.)

no mining done until Cole got it?

A. I couldn't swear, but about twenty years.

Q. And then Cole came in and undertook to make some showing?

A. He done quite a little work there.

Q. Do you know whether he worked every year or not? A. I couldn't swear to that.

Q. Were you up there about every year?

A. I used to herd cattle and drive cattle around there almost every year.

Q. Did you see anybody there every year?

A. I didn't go down every year. I might look down from the mountain.

Q. Could you tell from the water of the ditch up there on the side of the canyon as to whether or not Cole was doing any mining down there?

A. Well, I don't remember now. The ditch runs on the west side of the canyon, but that was abandoned too in my time, or in early times.

Q. By Layton or Boswell?

A. I was roadmaster there for two years and it was abandoned for several years, and I filled up the ditch.

Q. Was Boswell there? A. He was.

Q. Did he consent to your filling it up?

A. He did. [148—92]

Q. Now, about these wells. As I understand you, you sunk your wells last year lower. Was that on account of a shortage in the water?

A. The water sinks, you know. The creek sunk and the water followed it.

(Testimony of Lawrence Faulkner.)

Q. And when there was no water in the creek then you had to go lower down to get water, is that right? A. Yes, sir.

Q. Did you have to sink your well also this year?

A. No, it stands there yet.

Q. You are speaking of this spring. Is that spring flowing any considerable amount of water?

A. No, just standing in a hole. There used to be an old beaver there. In fact, the whole creek has been worked by beaver.

Q. Take it in ordinary seasons when the land has been overflowed and saturated with the standing water, what about your well and this spring, is there water then? A. Oh, yes, sir.

Q. More than this year?

A. Oh, yes, sir, it runs then.

Q. When the lands have been saturated then the spring runs? A. Yes, sir.

Q. But now the water simply stands there?

A. Now the water simply stands there.

Recross-examination by Mr. HART.

Q. Didn't water from the spring run last year?

A. Yes, sir. [149—93]

Re-redirect Examination by Mr. HUNTINGTON.

Q. How did the water last year compare with the year before? A.

Mr. HART.—Objected to as not proper redirect examination and incompetent.

A. You could tell it was running, and that was all you could tell this year.

Q. How about the year before?

(Testimony of Lawrence Faulkner.)

A. Oh, it run along until May.

Re-recross-examination by Mr. HART.

Q. You say the spring run two years ago until May? A. Yes, sir.

Q. And then it got down low just like it is now?

A. Yes, sir.

Q. And the year before that it ran longer also?

A. Yes, sir.

Q. And then it ran lower just like it is now?

A. Yes, sir.

Q. Do you know the Eldorado Mining Company ditch? A. I do.

Q. It has not been delivering any water into Willow Creek for [150—94] the last two years?

Mr. HUNTINGTON.—Objected to as not proper recross-examination, incompetent, irrelevant and immaterial.

Q. I will withdraw that question.

Witness excused.

[Testimony of John E. Johnson, for Complainant.]

JOHN E. JOHNSON, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. What is your business, Mr. Johnson?

A. I am a surveyor.

Q. How long have you followed that business?

A. Well, practically twenty-two or three years.

Q. What experience have you had in the matter of surveying running lines, surveying lands, making measurements and doing the engineering work for

(Testimony of John E. Johnson.)

ditches and reservoirs and that sort of work? [151—95]

A. Well, I had a great deal of experience along those lines the last twenty-odd years.

Q. I will ask you to state whether or not you made a survey of the lines, of the east line of Section 27 in the canyon of Willow Creek opposite where the dam of the defendant company is being constructed? A. I did.

Q. How did you locate that line?

A. I located that line by running in from the east and failed to find—on the west I should say. And I ran in from the south and I ran in from the north, and I also ran in from the east and satisfied myself that the corner out there had never been placed there, or it had been destroyed.

Q. That is the corner—the northwest corner of Section 27?

A. The southwest corner of Section 27.

Q. The southwest corner of Section 27?

A. Yes, sir.

Q. Did you find—did you locate the quarter corner on the west side of Section 27?

A. No, I didn't find it.

Q. Did you find the northwest corner of Section 27? A. No, sir.

Q. What corners did you find, and upon which you based your survey?

A. I didn't find any corners of twenty-seven. I did find a corner a mile west from the southwest corner of Section 27, and I found the corner a mile west from the northwest corner of Section 27.

(Testimony of John E. Johnson.)

Q. Then running the line a mile west from those two corners you run the line then along the west side between [152—96] Sections 27 and 28?

A. Yes, sir.

Q. Where is that line located relative to the dam site of the defendant company?

A. The line running north and south would cut just the southwest corner of the dam at the bottom foundation of the dam.

Q. About how many feet of the dam would be across on Section 28?

A. I didn't make any measurement, because there wasn't any definite stakes placed there by the engineers that would locate to me exactly the foundation of the dam.

Q. Have you done any surveying since then?

A. Yes, sir.

Q. From the surveying you have done since could you tell about how much of the dam would be on Section 28 and how much on Section 27?

A. I could approximate it. There would probably be 25 or 30 feet of the corner of the dam.

Q. Does this map which I have shown you, and which is marked "Plaintiff's Exhibit 1" for identification—was that map prepared by you?

A. It was.

Q. From the data obtained by that survey you have referred to? A. Yes, sir.

Q. You may state whether or not that map correctly represents the location of the line and of the dam site?

(Testimony of John E. Johnson.)

A. Yes, sir, as near as I could establish the corners from such points as was already established I could run from.

Q. Do you remember about any physical object on the northeasterly end of the dam? [153—97]

A. There was a rocky hill. Q. Or butte?

A. Or butte, yes, sir.

Q. Is that a permanent object in the canyon?

A. Yes, sir, it is.

Q. Now, when was the survey made?

A. It was made July 27th, 1908.

Q. Was that the first time you had surveyed for that line? A. Yes, sir.

Q. And about located the dam site?

A. Yes, sir.

Q. We offer the map in evidence and ask to have it marked "Plaintiff's Exhibit 1." Mr. Johnson, with the consent of the Examiner, please take that map and make out blue-prints and we will substitute the blue-print for the original.

Q. Have you made any survey for the purpose of determining the area of the proposed reservoir of the defendant company? A. Yes, sir.

Q. Have you made a map showing the result of that survey? A. I have.

Q. The lines which are marked upon this map, do they represent what the map shows them to represent? A. They do.

Q. The contour lines of the reservoir is made on what elevation of the dam?

A. It is made at 101 feet above the bottom of the

(Testimony of John E. Johnson.)

head of the conduit of the reservoir site.

Q. Does this map correctly represent the location of the dam?

A. Very closely. I wouldn't say—it might miss it a few [154—98] feet, but it is very close.

Q. From that survey what is the total surface area of the reservoir that would result?

A. I would say I made a very close calculation of the surface area up to where the canyon became quite narrow; from there on I only approximated it.

Q. Is that point where you made the accurate calculation indicated by a dotted line with two arrows?

A. Yes, sir, pointing east and west.

Q. Well, of that portion which you made, as to which you made a careful calculation, what was the surface area? A. 136 acres.

Q. And what do you estimate the area from the narrow point in the canyon which you have designated by the dotted lines amount to?

A. 30 acres.

Q. From that measurement can you—that survey, can you determine approximately the capacity of the reservoir? A. Approximately, yes, sir.

Q. What do you say would be the capacity in acre feet of the storage?

A. The total approximate acre feet would be 7,100.

Q. When you say that is approximate, can you state whether or not that is the maximum, or the probable average or minimum?

(Testimony of John E. Johnson.)

A. I would say that is the maximum.

Q. We offer this map in evidence and make the same request that blue-prints be substituted so that we can all have copies and ask to have it marked "Plaintiff's Exhibit 2" and ask the witness to prepare the blue-prints.

Q. Did you ever make any examination of the channel of Willow Creek after it leaves the canyon through the lands belonging [155—99] to the Eastern Oregon Land Company?

A. Yes, sir.

Q. From that examination did you make a survey of the amount of the lands which are subject to overflow?

A. Yes, sir.

Q. How did you determine what lands are subject to overflow?

A. By the grasses that grew on them, and showing the rubbish deposit and the channels cut, erosions of the ground surface.

Q. Would the ordinary growth of sagebrush which grows on the uplands be found on any of these lands you describe as overflowed lands?

Mr. HART.—Objected to as incompetent, and it assumes.

A. No, there may be scattering brush here and there, but, as a rule, no brush lands overflow for any length of time or they do not grow sagebrush. Water tends to kill sagebrush where it stands on the ground very long.

Q. I refer to Section 31, Township 15 South, Range 43 East, W. M. Can you state either from

(Testimony of John E. Johnson.)

memorandum that you made yourself at the time the measurements were made or from memory the nature of the channel of the creek?

A. I found this: This, the channel on the north line of Section 31, that is where the north line crosses the channel rather is very deep and wide. And where it crosses the channel on the east line of Section 31 it is, while quite large, but not as large as it was on the other line.

Q. Did you make measurements there?

A. I made measurements on the north line.

[156—100]

Q. State them, please.

A. I don't believe I did, but I recollect crossing there. The channel on the north line is 200 feet wide. The main channel was 12 feet deep, but there was a water channel that was still deeper where there was some water that was about 18 feet below the surface.

Q. That is 12 feet wide at the top, do you mean?

A. 12 feet deep.

Q. How wide was it at the top?

A. 200 feet.

Q. That is the top measurement?

A. That is the top measurement.

Q. Did you make a bottom measurement?

A. No, I did not. The banks, though, are very nearly perpendicular. There is an old bottom of this channel, dry now, but there is another lower channel where there is water at present. There are two channels there.

(Testimony of John E. Johnson.)

Q. I call your attention to Section 5, Township 16 South, Range 43 East. Is there any overflow land on that section, and, if so, about how many acres?

A. Yes, sir, there is some overflow land there. I have no memorandum here excepting some I placed on maps I marked in.

Q. I hand you a map here. Is that the memorandum you made? A. It is.

Q. Refreshing your memory from that plat, how many acres were there? A. 88.61 acres.

Q. I will call your attention to Section 23, Township 16 South, Range 43 East. How much land is naturally overflowed on that section? [157—101]

A. 45.60 acres.

Q. On Section 25, Township 16 South, Range 43 East, how many acres were there?

A. 41 acres.

Q. Was there any overflowed land on Section 13, Township 16 South, Range 43 East? I would say to the counsel that this section is not crossed by the main channel of Willow Creek but is affected only by the high water of Willow Creek.

Judge WEBSTER.—Objected to as irrelevant and incompetent and not in the complaint—not within the issues.

A. 36 acres.

Q. I call your attention to Section 15, Township 17 South, Range 44 East. How many acres of overflowed land were there on that?

A. 80.74 acres.

(Testimony of John E. Johnson.)

Q. Do you remember did you make any survey on Section 9, Township 16 South, Range 43 East, or did you make any estimate as to the overflowed land on that?

A. I don't find any notes on that.

Q. I call your attention, to refresh your memory, to a tract of land near the Kelly corral which you and Mr. Clagett estimated the overflowed land but did not make an accurate measurement of. Do you remember of making an estimate of such a tract?

A. Yes, sir; I recall now that we walked out over it and went down the west line if I recollect right.

[158—102]

Judge WEBSTER.—Objected to as irrelevant. You are referring now to Section 9, aren't you?

Q. I refer to a tract of land on Section 9 near the northwest corner of the northwest quarter of Section 9 near what is know as the Kelly corral. Could you state now from memory what estimate the acreage of that overflowed piece was?

A. I recall now about looking at that piece of land but I do not recollect the channel of Willow Creek crossing it, but it showed indications of being overflowed, but to my memory now in the neighborhood of 15 or 20 acres.

Mr. HART.—Move to strike out as not within the issues.

Q. From your survey and observation of these several tracts of land I would ask you to state whether or not the amount of overflowed lands could be increased by the damming of the creek on these

(Testimony of John E. Johnson.)

same lands themselves?

A. On most of *the*; yes, sir.

Q. Did you make any measurements as to determining how much? A. No, sir, I did not.

Q. What is the general topography of the valley of Willow Creek, particularly that portion of which lies adjacent and near to the creek, in fact say from a quarter of a mile to a mile and a half or two miles on each side of the creek?

A. Well, it varies. Some places especially where Willow Creek channel is deep and large, when the channel gradually slopes away from the creek, while the most of the lands there lies very flat and level for an average of half a [159—103] mile on each side of the creek, but, of course, the creek comes nearer to the foothills on one side and sometimes on the other.

Q. Is that true of the lands of the Eastern Oregon Land Company which you surveyed?

A. Yes, sir.

Mr. HART.—Objected to unless the land is specifically pointed out.

A. I would say that the lands practically all lie level each side of the creek for a considerable distance with the exception of Section 31, Township 15 South, Range 43 East, where the lands, especially on the northeast, slopes away from the creek quite rapidly.

At the hour of 8:45 o'clock P. M., July 21st, 1909, adjourned until 9:00 o'clock A. M., July 22d, 1909.

At the hour of 9:00 o'clock A. M., July 22d, 1909,

(Testimony of John E. Johnson.)

met pursuant to adjournment as above. Present:
Same as before. [160—104]

J. E. JOHNSON, Recalled.

Direct Examination by Mr. HUNTINGTON.

Q. In your survey of these several overflowed tracts, concerning which you testified yesterday, did you include in your measurements all of the land that was apparently overflowed or only such land as was overflowed to such an extent as to destroy the sagebrush growth?

A. I only—only those that apparently had water standing on them a long while and had killed the sagebrush growth and caused a growth of wild grass.

Q. Were there any evidences of the water having overflowed other portions upon which the sagebrush was not entirely killed?

A. Yes, sir, there was lands adjacent to the ones I testified as to submerged lands that there was indications they overflowed at times at periods but no definite lines to them; there was nothing to them to make exact measurements of them.

Q. Have you been engaged in farming at all during the time you have lived in this county?

A. Yes, sir, I had a ranch 25 years here.

Q. Have you had any experience with respect to lands which are flooded to some extent but not sufficient to destroy the sagebrush?

A. Not on my own land I have not. Willow Creek flows in a deep channel, but, of course, as I observed places where I have been at work.

Q. From your observation what do you say as to

(Testimony of John E. Johnson.)

lands which are overflowed, but upon which not sufficient water has stood to kill the sagebrush and without irrigation, and with [161—105] these short periods of overflow producing crops?

A. Yes, sir, those lands produce certain kinds of crops such as rye grass hay for instance. Certain grasses make very good crops with a short season of overflow. They would produce grain crops if the overflow did not prevent farmers from getting onto the ground at the time the grain should go in.

Q. I didn't ask you yesterday about the measurement of the channel of the creek through those tracts, except the tract in Section 31. Have you memorandum made at the time concerning the width and depth of the channel through the other tracts of land belonging to the Eastern Oregon Land Company which you examined?

A. Nearly all of them, I believe, with maybe one or two exceptions.

Q. I refer to Section 5, Township 16 South, Range 43 East. What is the width and depth of the channel of the creek through that tract?

A. On the north line of Section 5 crossing the channel is about 80 feet wide on top, 16 feet on the bottom and 12 feet deep; and, on the east side of Section 5 across Willow Creek the channel is 15 feet wide. That is the average width of it and about four feet deep.

Q. How was it on Section 23, Township 16 South, Range 43 East? I refer to that part of the tract which belongs to the company and about which there

(Testimony of John E. Johnson.)

is no controversy?

A. On the north side of Section 23 across one channel 30 feet wide on top, about five feet wide on the bottom and five feet deep; crossed another small branch farther on but I did not take its measurements.

Q. Is that the north side of the section—is that on the [162—106] north side of the land owned by the company and about which there is no claim?

A. Yes, sir, and commencing at the corner running west—running south and counted the creek at three chains.

Q. Then the north measurement that you have just referred to was the measurement on the north side of the southeast quarter of the northeast quarter, was it? I call your attention to your plat.

A. I didn't read the notice before. I only took part of it. That is how I made an error in giving that description. I will read my notes as I have them here, and probably you will get them more correctly. "Commencing at a point 20 chains south from the northeast corner of Section 23, Township 16 South, Range 43 East, and then run west three chains Willow Creek running southeast about 30 feet wide on top, 5 feet wide on the bottom, five feet deep. At six chains small branch of Willow Creek. Then commencing at a point 20 chains south of the northeast corner of Section 23 and ran thence south 15 chains, Willow Creek, about 20 feet wide and four feet deep. And at 20 chains and 30 links the branch of Willow Creek I did not take its measurements.

(Testimony of John E. Johnson.)

It is a small channel.”

Q. I call your attention to the northwest quarter of the Section 25, Township 16 South, Range 43 East. What were the measurements of Willow Creek there—of the channel?

A. Commencing at the northwest corner of 25, range and township as given, I ran east and at 6 chains and 80 links crossed branch of Willow Creek 3 feet wide and 3 feet deep. At 18 chains branch of Willow Creek about 25 feet on top, 3 feet on the bottom and four and a half feet deep. At 19 chains and 50 links crossed branch of Willow Creek about [163—107] five feet wide and $3\frac{1}{2}$ feet deep. At 28 chains Willow Creek about 26 feet wide on top and 8 feet wide on the bottom and 9 feet deep. At the quarter-section corner I ran south 7 chains, crossed Willow Creek, same dimensions as last notes. At 25 chains and 50 links branch of Willow Creek about 20 feet on top and 3 feet on the bottom and 10 feet deep.

Q. Did you make any measurements of a channel of the creek crossing in part Northwest quarter of Section 5, Township 17 South, Range 44 East?

A. No, I didn't make any measurements whatever. I have a note here where I crossed the channel but it was only a small channel.

Q. Where does that channel cross that quarter section?

A. At 44 chains west from the northeast corner of Section 5.

Q. You didn't measure the size of it?

A. It was only a small channel. It didn't look

(Testimony of John E. Johnson.)

as though it had water in it for a long while was the reason I did not measure it. I should judge it was probably six or eight feet wide and probably two and a half feet deep.

Q. I will call your attention to Section 9, Township 17 South, Range 44 East. What measurements did you make at the channel of the creek?

A. Commencing at the northeast corner of Section 9 I ran south 19 chains and 30 links, branch of Willow Creek that I did not make any measurement of. At 29 chains crossed Willow Creek 20 feet wide and 9 feet deep. Then commencing again at northeast corner of Section 9 I run west and at five chains and 75 links I run west crossed branch of Willow Creek 12 feet wide and 4 feet deep. At 17 chains Willow Creek again about 20 feet wide and 6 feet deep. [164—108] At 26 chains and 10 links branch of Willow Creek about 12 feet wide and 10 feet deep.

Q. What measurements did you make as to the channels of the creek through Section 15, Township 17 South, Range 44 East?

A. Commencing at northwest corner of Section 15 I ran east. At 28 chains crossed Willow Creek 26 feet wide on top, 20 feet wide on bottom and 6 feet deep. At 39 chains and 20 links crossed branch of Willow Creek, averaging 8 feet wide and about 4 feet deep. Commenced at northeast corner of Section 15 and ran south and at 49 chains crossed branch of Willow Creek but did not make any measurements of it. It was only a small channel. And at 58 chains and 75 links crossed Willow Creek, average 7 feet

(Testimony of John E. Johnson.)

wide and 3½ feet deep.

Q. Did you measure the channel as it passed out of Section 15, the main channel—or the larger channel as it passes out of Section 15 near the southeast corner?

A. No, these measurements that I have given here is all that I took.

Q. Were these plats which I hand you prepared by you from the data made on that survey?

A. They were as to where they cross the section lines, but where the channels cross the section I did not follow the channel. I had to put that in at random and my recollection.

Q. That is, the course and bends of the creek from the place where it entered the different tracts to the point where it left them are put onto this map from your recollection?

A. Yes, sir. In other words, I did not meander the creek, I only took notes where it crossed the section lines.

Mr. HUNTINGTON.—We offer these plats in evidence and ask to have them marked “Plaintiff’s Exhibits 3, 4, 5, 6, 7, 8, 9, 10,” [165—109] and we will substitute blue-print copies for them.

Cross-examination by Judge WEBSTER.

Q. Can you tell, Mr. Johnson, how much of the area of the reservoir, or the part of it that would be covered by water by the reservoir, how much of that is in Section 28?

A. No, I didn’t make any calculations as to the area in the various sections.

(Testimony of John E. Johnson.)

Q. Can you tell by your notes?

A. No, I cannot.

Q. Can you figure it out from this plat?

A. It would take some little time to get it exact, the subdivisions of the tracts.

Q. Well, there is more than half of it, isn't there, on Section 28?

A. Well, I would have to look at the map myself and make a mental calculation.

Q. You didn't run the line?

A. No, I didn't run the line south, but I simply took all of the lines of the contour and platted them, and, in platting them they closed and proved the work correct. And the section lines must cross the contour lines.

Q. Then, you don't know how much of 27 is in there?

A. No, sir, I did not figure it.

Q. You would just have to figure it out from the map? [166—110]

A. Yes, sir.

Q. In running those lines between Sections 27 and 28 what instruments did you use—the solar compass?

A. No, a plain transit.

Q. That has a magnetic needle?

A. That is all that is used in running plain lines.

Q. You say you found a section corner down at the southeast corner of Section 28?

A. I would have to refer to that first map there, the corners are marked there as to what I found.

Q. Well, don't you remember?

(Witness examines plat.)

(Testimony of John E. Johnson.)

Q. You found section corner at southwest corner of Section 28, didn't you? A. Yes, sir.

Q. And at the northwest corner too?

A. No, not at the northwest corner.

Q. You didn't find any up there?

A. No, sir.

Q. How far did you measure east from the southwest corner of Section 28 in order to find the southwest corner of Section 27?

A. I ran east from the southwest corner of Section 28 a half mile and hunted thoroughly for the quarter section corner and couldn't find it, and then ran on to where it should be and couldn't find it.

Q. There was no corner there?

A. There was no corner there. And then I came back to the southwest corner of Section 28 and ran north. I found the quarter section corner on the west line of section 28 and continued on to where the northwest corner should be [167—111] and hunted thoroughly and couldn't find the corner. I ran another mile and found the corner, that is, the northwest corner of Section 21. I ran east a mile from the northwest of Section 21 and found a section corner. I also ran east another mile and on the way I found the quarter section corner on the north of Section 22, and also the southeast corner of Section 22, and I ran south from that point two miles without finding any corners. I then ran west from where the southeast corner of Section 27 should have been.

Q. There wasn't any corner there?

(Testimony of John E. Johnson.)

A. No, sir. And I checked very close with the course and distances that I ran from the southwest corner of Section 28 on for the southwest corner of Section 27. We made another thorough hunt for the corner and failed to find it. And the line running north and south between Sections 3 and 4 in Township 15 South, Range 42 East, and between Sections 33 and 34 in Township 14 South, Range 42 East, between Sections 27 and 28, and between Sections 21 and 22, and hunted thoroughly for corners and didn't find any on that distance, but checked very close again with the point where we were looking for the southwest corner of Section 27. We spent about a week there running those lines over from all directions and long distances in order to satisfy ourselves thoroughly as to where that corner should be, and also hunted thoroughly over and over again for it and couldn't find it. And from these various measurements I established a point that should be the corner of Section 27.

Q. Do you know whether those are more than full sections or not?

A. From the lines I did find corners on the sections are generally full as near as we generally find them. [168—112]

Q. You very frequently found on these surveys the sections are not full, or that they are more than full?

A. They vary. Our chaining, in retracing a line, are usually a little more carefully surveyed than the original survey and we are liable to run from half

(Testimony of John E. Johnson.)

a chain to two chains and I found a variation, and it is a rule to proportion distances where lost corners are, and I established distances from the known corners and in checking up distances from known corners.

Q. And, in order to put these corners where they are, you had to proportion distances?

A. Yes, sir; there is a little over a chain—I have not the notes with me, but my recollection is there is a little over a chain difference. I don't remember the exact amount and would not be positive.

Q. You mean a little over a chain—

A. That our measurements over-run.

Q. Your measurements would put the line between Sections 27 and 28 about a chain farther east than it is. Is that what you mean?

A. No. In other words, in running the two miles through there or in running from where the corners—in running from where the southeast corner should be from the way I ran south from the known corner the measurements were a little short. Or we ran over, in other words, and I proportioned it in running this line north and south between the nearest known corners—I took that into consideration. In Government land surveys the lines running north and south, in theory, should be true; the lines running east and west would vary. In other words, if you should see the lines east and west they would zigzag, while the lines running north and south [169—113] would run straight.

Q. What I mean is: The final result in your

(Testimony of John E. Johnson.)

averaging up variations was to put that line farther west? A. Well, if you ran from—

Q. Well, I mean if you had put it down just as you measured it, without any averaging of variation, you would have that line farther east than it is, would you not?

A. If I measured from the southwest corner of Section 28—

Q. Well, you did measure from there?

A. Then as we over-run, the corner as we averaged it up would drop back a little bit west. In other words, my measurements running from the southwest corner of Section 28, establishing a point at the mile, and then coming in from the east, we lap over a trifle, and then the true corners should come in halfway between on that land. It was only a trifle but I can't remember the exact amount.

Q. Wasn't there some variations of the needle in making that survey in there?

A. The variations of the needle would not affect the measurements of the chain, and I had corners enough to check up on to rectify any variation there might be in the lineal attraction.

Q. There were some variations then?

A. Yes, sir.

Q. Do you remember what?

A. No, I didn't make a note of that.

Q. Didn't you have some doubt in your mind as to whether you got the correct corner?

A. No, I did not.

Q. You did not express any?

(Testimony of John E. Johnson.)

A. I spent nearly a week there in satisfying myself thoroughly [170—114] as to where it should be.

Q. You were, of course, employed by the Eastern Oregon Land Company in making that survey?

A. Yes, sir.

Q. And were you assisted by the agent of the company?

A. Yes, sir, in most of the surveys.

Q. Is that true in making this survey?

A. No, sir.

Q. He wasn't with you there?

A. No, sir.

Q. In locating the corner?

A. Yes, sir; but you are pointing to the other map there.

Q. He was with you in locating the corners?

A. Yes, sir.

Q. But not in making the contour of the reservoirs? A. No, sir.

Q. You set down here on map ("Plaintiff's Exhibit 2") just the area of land that would be covered by water which would be retained by a dam 100 feet high? A. Yes, sir.

Q. Now, in measuring this area of overflowed land as you have it here the company's agent was with you all the time? A. Yes, sir.

Q. When you made the surveys and measurements the lands were not covered with water at all, were they? A. No, sir.

Q. It was made in July? A. Yes, sir.

(Testimony of John E. Johnson.)

Q. About this time of the year, wasn't it?

A. The date is there—July 27th, 1908.

Q. No. June 9th, but these were made this year?

[171—115]

A. Yes, sir.

Q. Just a little while ago?

A. Yes, sir.

Q. And then all you know about it, what land was overflowed, was what you saw in the appearance of the ground there?

A. Yes, sir, and the vegetation growing there.

Q. And you would not know whether that would be overflowed regularly or a year now and again?

A. No, I couldn't tell.

Q. You couldn't tell that?

A. No.

Q. I think you said awhile ago that land overflowed would kill sagebrush?

A. Where the water stood in it any length of time it would kill the sagebrush.

Q. And this land you have marked there as overflowed on these various sheets (Plaintiff's Exhibits 3 to 10) they haven't got any sagebrush on them?

A. There may be a sagebrush now and then on some knoll where the water wouldn't kill it but it is practically without sagebrush.

Q. Then, it is not all level, all this land you have marked as overflowed?

A. It would generally be termed level; there is a variation of about a foot, but generally it would be termed as level land.

(Testimony of John E. Johnson.)

Q. How deep does water have to get on the land (take Section 5, for example) Section 5, Township 16 South, Range 43 East, before it would cover the highest part of the overflowed land?

A. I couldn't say as to that. The general fall of the water [172—116] is with the creek. The water spreads out at the upper part with the creek and overflows the level land.

Q. Then it wouldn't stay on there after the creek goes down?

A. Excepting in some low place that is low enough to hold a few inches of water.

Q. Then, the low places where it staod wouldn't raise anything?

A. The grass will grow *nuder* three or four feet of water; other grass will grow in 6 inches of water and do very well.

Q. If it stands all the year?

A. Yes, sir. I am pretty well acquainted in Hærney County and there they raise nearly all their grass and the water stands from six inches to two feet deep all the time during the spring.

Q. The water doesn't stand on all of it?

A. It does there very nearly continuously, and although the grass is still living the water still covers the ground.

Q. Aren't there some springs on Section 5?

A. I couldn't say; I didn't see any.

Q. None at all?

A. No, I didn't see any.

Q. What is the fall of that creek, do you know,

(Testimony of John E. Johnson.)

Mr. Johnson, of Willow Creek?

A. No, I don't. I never had occasion to take the levels or fall of the creek.

Q. Well, does it fall with a pretty good current, or is it a sluggish stream?

A. It is not a very rapid stream by any means.

Q. Well, with a large volume of water in it, with water that would fill the banks at the places where you mentioned are, wouldn't that flow with a pretty strong current, don't you [173—117] think?

A. Yes, sir, where it is confined it would. Where the valley is so formed that it turns the water and made a center channel—the water has been confined and cut a deep channel.

Q. How deep?

A. There is one here 18 feet deep.

Q. And how wide?

A. 200 feet on the top.

Q. Well, now, if the creek in high flood time, that we hear about in this creek, if the water practically filled that channel it would run pretty fast, wouldn't it?

A. Yes, sir.

Q. Do you have an idea—

A. I will explain that a little farther. It would run fast provided the channel were open and free, but most of those channels are filled with a wild growth. It has quite a number of beaver dams in it and that retards the flow of the water very materially.

Q. Where is that?

A. That is in Section 31, Township 15, I believe.

(Testimony of John E. Johnson.)

Q. In Section 31, Township 15?

A. Yes, sir.

Q. On the company's land? A. Yes, sir.

Q. You don't know anything from personal knowledge, as I understand you, about these overflows each year—I mean by seeing the overflow?

A. On Willow Creek?

Q. Yes, sir.

A. No, but I think I have seen Willow Creek when it overflowed those lands, but I never paid particular attention to the tracts it overflowed. [174—118]

Q. It does some seasons have quite a full flow of water along in February and March, doesn't it?

A. Usually, yes, sir. May I amend an answer I gave while ago? I believe I was asked whether the company's agent was continuously with me on the surveys. I believe there was one or two of those surveys I ran that Mr. Clagett wasn't with me.

Q. You mean the surveys of the overflowed lands? A. Yes, sir.

Q. You say "Mr. Clagett." Is he the company's agent?

A. Yes, sir, that is the company's agent. I had other help and Mr. Clagett wasn't along with me on those one or two surveys.

Q. You endeavor to include in those overflowed lands all of the land actually had been overflowed at all?

A. No, only those that had been overflowed, you might say regularly, and that water stood long

(Testimony of John E. Johnson.)

enough to show positively they were overflowed lands that I couldn't make a mistake on.

Q. Were these lands overflowed in 1908?

A. I couldn't say as to that. The probabilities are that they were not because it was a low-water season.

Q. Well, your opinion is based upon the fact as a matter of general knowledge that was a low-water year, wasn't it?

A. Yes, sir, it was a low-water year and not much water in Willow Creek.

Q. Had it been overflowed in 1909?

A. Some of it.

Q. Not all of it?

A. No, not all of it in 1909.

Q. Was there anything growing on it the year you was there— [175—119] last year?

A. There was grass on most of it.

Q. Nearly all of that you have marked as overflowed had grass on it, did it?

A. Yes, sir, practically all of it.

Q. Last year or this year?

A. This year.

Q. Well, I suppose, generally speaking, where the overflowed land is the channels of the creek are not so deep and probably not so wide as they are elsewhere?

A. No, that is the general rule.

Q. Well, that land on Section 5 is on a bench, isn't it?

A. Well, there are two sections 5 we mentioned.

(Testimony of John E. Johnson.)

Q. When I am talking about Section 5, I mean Section 5 in Township 16 South, Range 43 East. That is under fence that land which is overflowed there?

A. Yes, sir.

Q. And the road runs along there by it?

A. The road runs right at the foot of the hill—between the fence and the hill.

Q. Isn't there quite a good-sized spring there that runs down into that overflowed land?

A. There is a spring, I believe, right in the edge of the road, but it doesn't flow over there.

Q. It doesn't flow onto this land?

A. Not when we were there.

Q. What kind of grass grows there?

A. I don't know as I could name them all—I found patches of wire-grass.

Q. Isn't that wire-grass a swamp grass?

A. Yes, sir, it is considered swamp grass. [176—120]

Q. And isn't there a drain ditch that drains that off and that it is a swamp?

A. There isn't this year.

Q. I speak of it as being swamp land—not this year.

A. No, I would not consider it swamp land.

Q. Isn't it land that it is necessary to drain in ordinary years, don't you think?

A. I would not consider it swamp land, generally my passing over it there when making that survey, although there are spots low enough that might have to be drained.

(Testimony of John E. Johnson.)

Q. Isn't there a drain ditch on the land now?

A. Yes, sir, there is a ditch there but I don't know whether it is an irrigation ditch or a drain ditch.

Q. But the effect of the ditch, whether to carry the water on it, or to carry the water off the land, the ditch is on the land?

A. The ditch taps the creek and the banks and I would rather think it would have a tendency to keep the water on there.

Q. You think the ditch taps the creek to irrigate that land?

A. No; I would think the ditch was constructed to conduct water from Willow Creek to some of the lands farther down.

Q. You don't know whether the ditch runs back into the creek or not?

A. No, I don't; I didn't follow it.

Q. If it is run back into the creek that would probably modify your ideas as to whether it was an irrigation ditch or not?

A. I would have to see it too. Sometimes the ditch is turned back into the creek to use the surface water and take the water back into the creek so I would have to see the ditch for myself before I could answer that. [177—121]

Q. In Section 23, Township 16 South, Range 43 East, do you remember that section? Do you remember whether that land is under fence or not?

A. Yes, sir, that was under fence.

Q. What did you say?

(Testimony of John E. Johnson.)

A. That land was under fence.

Q. There was about the same kind of growth on that as there was in Section 5?

A. Yes, sir, practically the same.

Q. About the same kind of growth on all of it, isn't it—all of this overflowed land you have been telling us about? A. Yes, sir.

Q. And a pretty poor growth?

A. It certainly was this year.

Q. It is all years—that kind of grass is a pretty poor grass all years?

A. On one tract there is one grass predominates and on another there would be another.

Q. But the wire-grass?

A. Yes, sir, but there is a very small percentage of wire-grass.

Q. There is some foxtail on it?

A. At the time I made the survey it was too early for the grass to head out.

Q. All you know about this kind of grass is by what you saw there when you made this survey, isn't it, on this overflowed land? A. Yes, sir.

Q. And I suppose Mr. Clagett was probably talking about the kind of growth you and he, that grew on it?

A. I don't think it was mentioned—I don't recall now that it [178—122] was mentioned. About the only talk there was of the poor growth it was making.

Q. You don't know whether it was better or poorer that year than any other year?

(Testimony of John E. Johnson.)

A. Oh, yes, sir. I used to help haul hay on Willow Creek for my own use for several years, in earlier years.

Q. On these particular tracts?

A. No, not on these particular tracts, but on lands growing similar grass.

Q. Well, "earlier years," what do you mean by that?

A. Well, twenty-two or three years ago.

Q. I suppose you examined the creek banks at different places to determine how high the water usually rose on the banks? I presume that can be told?

A. That is the creek banks?

Q. Yes, sir.

A. Well, no, there is no definite line. The waters during flood-water times rises and lowers so that it doesn't stay long enough to form any particular water line and the banks there would indicate that. I would say this: Along those high banks I did find a drift up in the sagebrush showing that at some time or other water had been high enough to deposit drift in the sagebrush.

Q. You couldn't tell just when that was?

A. Not at all.

Q. Of course, it might be that the water would come up about that high every year, unless it should be a dry season like this year, the water might in every flood season?

A. No, that would not be probable at all, only in a very high season.

Q. You think it wouldn't overflow unless it was

(Testimony of John E. Johnson.)

an exceptionally [179—123] high season?

A. No, not those high banks.

Q. Having now reference to these overflowed lands as a whole that you have talked about, there might be in it some places at least where there might be more land subjected to irrigation by damming the creek, or did you testify to that?

A. Yes, sir, I testified to that. There are places where water could be spread over the land if the creek were dammed.

Q. Well, if you dammed the creek wouldn't you also force the water back on your neighbor above you?

A. Yes, sir, in some places. It depends on how it is situated.

Q. That is almost universally true where these lands are concerned?

A. It depends. Or it would continuously spread and that would reach lands below outside that was outside of these lands.

Q. There never has been anything of that kind done here so far as you can make out on the company's lands?

A. Not that I know of; no.

Q. Well, did you think that was a practical way of irrigating if the company wanted to do it, to put dams in the creek on its own land and thereby increase the water for its own irrigation?

A. I hardly know how to answer that. As to any particular tracts, do you mean?

Q. Anywhere?

(Testimony of John E. Johnson.)

A. Yes, sir, if it wanted to raise wild hay or grass, yes, sir, to put the water over the land and hold it longer.

Q. As a practical plan of raising hay profitably did it look [180—124] to you like a good thing to do?

A. I couldn't answer that. For my part I would want to grow the crop for wild grass.

Q. In other words if a man was going to raise something you would not raise at all as a farmer that would be all right?

A. Some lands wouldn't grow grass—like my lands for instance.

Q. Suppose this land—

A. Some of this land could be broken up and make good grain lands.

Q. Could it be made good grain land by any system of irrigation that could be devised by putting in dams and raising grain?

A. No, they couldn't make a successful grain crop by putting in dams and letting it run at random. As I say, the only crop that could be raised profitably in that way would be wild grasses just as it is growing now on Willow Creek.

Q. But to raise grain or any crop of substantial value haven't you got to get that water up around on the foothills? Isn't that a fact?

A. Well, yes, sir, if they are going to take the water out they have to have ditches.

Q. Well, if they are going to use the water for irrigation they would have to have ditches?

(Testimony of John E. Johnson.)

A. Well, I couldn't answer that only one way. The water taken out would only be profitable for wild grasses. It is not profitable for fruit, and it is only valuable for wild grasses and I don't think no one would take that land to raise fruit crops.

Q. Could you raise grain on it?

A. Not by that means of irrigation.

Q. If you had the water out of there and around up higher [181—125] where you could handle it on this land, and the other land adjacent to it, couldn't you raise grain there or alfalfa, or some more profitable crop than wild hay at \$1.25 an acre?

A. Some lands are more profitable. You couldn't confine the water in the channel and keep it off the lands without it would damage the alfalfa crop or any other crop but wild grass.

A. Then, this land isn't worth anything for anything else?

A. It depends on what you consider wild grass worth.

Q. Well, land that would raise a crop worth \$1.25 an acre isn't very profitable?

A. Well, that is a matter of opinion.

Q. How many inches of water to an acre would it require, do you think, to irrigate that land—six-inch pressure inches?

A. To irrigate the wild grasses growing there?

Q. Yes, sir, first take it for the wild grass.

A. Well, I don't believe you could irrigate grass land properly with less than two inches to an acre anyway. It takes more water for wild grass to be

(Testimony of John E. Johnson.)

overflowed than it does for any other crop we have.

Q. Do you know anything about the Eldorado ditch?
A. I don't know personally.

Q. You don't know the Eldorado ditch personally?

A. I don't know it personally; I never was on it.

Q. Don't you know, as a matter of fact, that it has been delivering water into Willow Creek?

A. I have always heard it rumored so.

Mr. HUNTINGTON.—Objected to as not proper cross-examination and witness has testified he doesn't know anything about it. [182—126]

Q. Don't you know, as a matter of fact that ditch has been delivering water in there for the last years and years?

A. No, I have just heard it talked about is all.

Q. What kind of land is that up there where the reservoir site is, generally speaking?

A. Well, there is just a box canyon with rim rocks. I know it is a pretty hard canyon to have to cross three or four times a day in hot weather.

Q. Just rocks and a little earth, and it is very precipitous isn't it?
A. Yes, sir.

Q. It shows that there has been mining going on up there at some time, does it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. On parts of it.

Q. What do you think that land is worth an acre?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

(Testimony of John E. Johnson.)

A. I haven't got an opinion in the matter at all.

Q. It is not worth a thing, is it—just as land is not worth anything?

A. Well, there is a little tract in there that might make a fairly good garden.

Q. How many acres?

A. Oh, I don't know as to that. A very few acres—five or six probably. [183—127]

Q. But the man who would have the garden would have to travel a long ways to take care of it, to get to it?

A. There is people living there now.

Q. The people living there are living there because they are working for the company?

A. I believe so.

Redirect Examination by Mr. HUNTINGTON.

Q. This mining, counsel has asked you about. Are there any evidences of any mining on the creek as far down as the dam?

A. Very near to the dam.

Q. How far down toward the dam are there any signs of any mining having been done?

A. Oh, I would judge to between—somewheres between six and 800 feet that I noticed particularly.

Q. That would be on Section 28?

A. Yes, sir.

Q. And all of the evidence of any mining there up to Section 21 are on Section 28? A. Yes, sir.

Q. Is there any evidence at all of any mining having been done on Section 27? A. Not any.

Q. Referring to your survey again. As I under-

(Testimony of John E. Johnson.)

stood you in running, or in determining the location of the west line of [184—128] Section 27, you relied upon the north and south line which you run as well as upon the east and west lines?

A. Well, I run the section lines both north and south there for two or three miles in each direction in order to find corners in place to determine the corners.

Q. The Government rule for the determination for the location of an obliterated corner is by running the north and south line?

A. It should be located between the two nearest known corners either east and west or north and south, but in locating on the north and south line it should be put in line—the north corner should be established on a line.

Q. Speaking of this grass growing up there which counsel asked you about: As I understood you, you said you purchased hay from there or hauled hay from there in that valley a good many years ago?

A. Yes, sir.

Q. Was that merchantable hay—were you buying it?

A. Yes, sir.

Q. You didn't raise it yourself?

A. No, sir.

Recross-examination by Judge WEBSTER.

Q. I understood you awhile ago, about that mining, you didn't pay any particular attention as to whether there had been [185—129] up there or not, did you?

A. Yes, sir, I did.

Q. You did pay particular attention to it?

(Testimony of John E. Johnson.)

A. Yes, sir, I did.

Q. Isn't there a mining ditch there that delivers water onto Section 27?

A. It does now but it didn't a year ago.

Q. It didn't deliver water on Section 27 a year ago?

A. No, sir.

Q. Wasn't it built clear on down into Section 27?

A. It wasn't completed.

Q. Hadn't it ever been according to your idea?

A. No. Just a little work done on the rocky pinnacle showing where a ditch was going to be. There never had been water through it and not enough ditch to carry water through it.

Q. Didn't you have the field notes from the Surveyor General's Office when you made the survey for the west line of Section 27?

A. No, sir.

Q. You never did have them?

A. They had been sent for but they didn't arrive in time for this and I saw the notes afterwards.

Q. Have you got the field-notes?

A. I have not.

Q. Have you worked out the field-notes?

A. No, sir.

Q. You don't know then that the field-notes actually put the dam farther over west than you have it located?

A. The field-notes doesn't mention the dam but the field-notes give the section in full. [186—130]

Q. But as platted by the survey as made that would result in setting the line farther east?

A. No, there is nothing in the field-notes that

(Testimony of John E. Johnson.)

could change the work I done there. I looked the notes over afterwards to see whether there was a possibility of overlooking anything.

Re-redirect Examination by Mr. HUNTINGTON.

Q. From the field-notes what do you say as to whether or not your work was correct?

A. I say it was correct.

Q. From examining the ditch was there evidence of any spillway from the ditch on Section 27?

A. No, sir, not a year ago.

Q. Was there on Section 28 any evidence of a spillway?

A. There was a number of places where water had broken out on the banks, but there was no particular place where there was an indication of a spillway.

Q. About how far over on Section 28 was the last of those places that indicated water had run down from the ditch?

A. I could hardly say but there has been water running down within five or six hundred feet of the dam and water had been taken from the ditch. And there had been a series of places where it looked as though water had been taken out for mining purposes all the way through Section 28. [187—131]

Q. But none lower down than the lowest mining in Section 28, as I understand you?

A. Not that I recall.

Q. When you made this survey to locate this west line of Section 27 was there any water running in that ditch? A. No, sir.

(Testimony of John E. Johnson.)

Q. What was its appearance as to whether water had once run in the ditch for a very long time prior to that?

A. I crossed the ditch in a number of places and noticed particularly that it looked like an old ditch, and there was a low bank and water had been working in.

Q. Any growth in it as to weeds?

A. I don't recall any particular growth but it was just working in over the sides.

Q. Judging from its appearance at that time, what could you say as to whether water had been in it for a number of years before that?

A. I couldn't say. It looked as though—you couldn't tell how long it had been running in it.

Re-recross-examination by Judge WEBSTER.

Q. Considering the area that would be covered by water when the reservoir is full, taking into account also the elevation, what would you say as to whether there would be a great deal of evaporation? [188—132]

A. The elevation at that altitude, probably being a box canyon, would increase the evaporation some, and there would be an evaporation per square foot that varies according to the heat, and just how much I couldn't say, but probably six or eight inches during the summer months.

Q. Over the whole surface? A. Yes, sir.

Q. And of course the seepage would amount to something also?

(Testimony of John E. Johnson.)

A. Yes, sir, and that would have to be found by actual test.

Q. But taking into account the character of the soil and the extent of the land covered you would expect quite a considerable seepage there, wouldn't you?

A. There is nothing really to base any calculations from. It is all owing to the nature of the bedrock. In some places the bedrock dips, and whether it is porous or cracked and seamy. And, of course, just simply passing over the ground I couldn't determine as to the depth or nature of that soil, and as to the bedrock.

Witness excused. [189—133]

[Testimony of I. W. Hope, for Complainant.]

I. W. HOPE, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. You reside in Vale, Mr. Hope?

A. Yes, sir.

Q. How long have you resided in this vicinity?

A. Something over 25 years.

Q. Where has your residence been most of the time?

A. In Vale or the immediate vicinity of Vale.

Q. I will ask you to state whether or not you are familiar with the conditions generally prevailing along Willow Creek as to the water supply and waters of the creek?

(Testimony of I. W. Hope.)

A. I am along the lower part of the creek from Scott's place on to the mouth of the creek.

Q. Have you had occasion to learn of the effect upon the creek from the overflowing of the lands by the so-called spring freshets? A. Yes, sir.

Q. I wish you would state what is the fact about the overflowing of the valley, and what effect these floods have upon lands which are subject to the annual overflow but which are not otherwise irrigated?

Mr. HART.—Objected to unless the question is confined particularly to lands involved in this suit and described in the complaint, that it is vague and indefinite and incompetent. [190—134]

A. Well, the lands—the overflowed lands produce a crop when they are overflowed, and when they are not they don't bring in no crop.

Q. What is the effect as to the valley overflowing in the ordinary run of years?

Mr. HART.—Objected to as indefinite in that it has no application to the lands involved in this suit and for that reason is incompetent.

A. In the lower part of the valley it overflows most of the years.

Q. When there is a natural overflow in the valley what is the fact with respect to the flow of water in the creek continuing after the flood waters have receded?

A. Well, the flow of water is greater in the creek later in the summer.

Q. Do you own any land up along Willow Creek?

A. Yes, sir.

(Testimony of I. W. Hope.)

Q. How far up the valley?

Mr. HART.—Objected to as immaterial.

A. Well, I have one piece of land about three miles north from Vale, and then I have another piece Willow Creek flows through about a mile and a half east of Vale, or northeast.

Q. That is in the lower valley?

A. Yes, sir. [191—135]

Cross-examination by Mr. HART.

Q. What business are you engaged in?

A. Well, I kind of vary it, some farming, and electric light business, and real estate and insurance.

Q. Have some object also as to the future development of the country? A. Yes, sir.

Q. Oil and so forth? A. Yes, sir.

Q. Well, during your residence here you have had occasion, you say, to keep an eye on, you might say, the topography of the country immediately adjacent to Vale and the flow of the waters that fall or run around here? A. I have.

Q. You, of course, are familiar with the fact that right outside of the edge of Vale there is a perpetual hot spring bubbling up at all times?

A. Yes, sir, I know that too.

Q. And you are familiar with the fact there are other hot springs situated generally in the State of Oregon?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

Q. Are you familiar with the fact of water flow-

(Testimony of I. W. Hope.)

ing in underground channels and bubbling out in lower places either in springs or seepage from the mountain sides—coming down and bubbling up?

A. I know something of the theory in it; yes, sir.
[192—136]

Q. You know that is done and illustrated by the hot springs?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

A. I presume so.

Q. That is the principle underlying the artesian wells you know of?

A. Well, yes, sir, but there is different varieties of artesian; some shoot water and some do not.

Q. It depends upon the height of the source from which the water arises?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

A. Yes, sir.

Q. I understood you to say there was overflow in the Willow Creek valley, in the lower part of the valley nearly every year?

A. I said most years, I think.

Q. You think there is most years?

A. Yes, sir.

Q. You had reference to the overflow from Mr. Scott's place on down toward the town of Vale?

A. Yes, sir.

Q. There are overflows in that portion of the valley—the water down in this lower portion of the

(Testimony of I. W. Hope.)

valley such as you are familiar with it gets out of the banks and creates the overflow more often than at the upper end of the valley, [193—137] doesn't it? A. I don't know as to that.

Q. Have you ever travelled through the valley to its full extent? A. Yes, sir, quite often.

Q. Have you noticed at times the water at the lower part of the valley would be spread out and at the upper end there would be no overflow?

A. No. Rather the reverse, I should say.

Q. Do you mean from your reasoning or from seeing it? A. No, from seeing it.

Q. I don't know or understand the exact reason of your statement that in the lower part of the valley that it overflowed nearly every year?

A. I think I testified that I was familiar with the creek from Scott's on down. While I have been over the valley above I am not so familiar with it.

Q. Then you testify that you are familiar with the lower part of the valley from your acquaintance especially with it? A. Yes, sir.

Q. Have you ever seen the water of Willow Creek overflow any of the lands of the complainant company that are mentioned in this case—the Eastern Oregon Land Company?

A. I don't know what lands are mentioned in this case. I have seen it overflow lands in odd sections along Willow Creek valley.

Q. You have seen the water overflow the lands in odd sections along Willow Creek valley?

A. Yes, sir.

(Testimony of I. W. Hope.)

Q. Did you ever estimate the amount of land that was overflowed?

A. No, I never did. [194—138]

Q. At times the volume of water coming down Willow Creek during these overflowed periods is a great deal larger in some years than others?

A. Yes, sir, very much so.

Q. On an average about how wide would the volume of water be? Of course, I understand this year and last year there has been no overflow, but for a period of years, about how much would be the extent from these overflows?

A. Well, that is pretty hard to estimate.

Q. Just give your best estimate.

A. Some places the ground is high, then it narrows down, and then it would be flat or level. I have seen it nearly all down a mile and a half wide.

Q. Now, about what would be the average depth of the water as it stood on this tract you speak of a mile and a half wide—how many feet deep?

A. I presume not over two feet deep.

Q. You think about two feet deep?

A. Yes, sir.

Q. And it would be moving down the channels of Willow Creek, spread out toward Malheur River and on to the sea?

A. Yes, sir.

Q. When these overflows occur such as you have indicated the water would move very rapidly, wouldn't it, when in the currents?

A. Well, that in this lower part of the creek depends on the Malheur River to a great extent. If

(Testimony of I. W. Hope.)

the Malheur River is high at the same time the flow is not very rapid in Willow Creek. If the break-up in the Malheur doesn't come at the same time it flows fairly rapid.

Q. Doesn't the Malheur River ever overflow its banks and [195—139] back up the creek?

A. Well, I don't know—yes, sir, it sometimes does at the lower part of Willow Creek.

Q. And the overflow from Malheur River sometimes overflows this land up the valley?

A. The Malheur River sometimes overflows some of the land near the mouth of the creek.

Q. Between here and Mr. Scott's?

A. I don't think so, as far up as opposite Vale—I think about as far as opposite Vale, taking the line north opposite the town.

Q. What would be the average width—you said you had seen it at times as wide as a mile? Would that be the average width of the stream as you saw it about the last fifteen years?

A. Just guessing at it.

Q. No, don't guess, just state your best recollection and your best judgment.

A. It would be a guess just the same, but I should say from half to three-quarters of a mile would be the average from Mr. Scott's to the mouth of the creek.

Q. And the average depth at that time would be how much?

A. Well, I should not judge it would be over two feet, the average depth when overflowed. It would

(Testimony of I. W. Hope.)

just be a guess because I never measured it.

Q. Are you familiar with the Eldorado Mining ditch?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

A. I have been along it several times. [196—140]

Q. Do you know what creek the Eldorado Mining ditch gets its supply of water from?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

A. From Burnt River and tributaries.

Q. Do you know what creek it empties its waters into?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

A. I do; Willow Creek.

Q. Do you know whether it has been emptying any water into Willow Creek during the last two years?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

A. Yes, sir, I do; I think I do anyway.

Q. Well, has it? A. Yes, sir.

Q. Didn't the flume there burn up or was torn up since about two years ago?

Mr. HUNTINGTON.—Objected to as not proper

(Testimony of I. W. Hope.)

cross-examination, incompetent, irrelevant and immaterial.

A. I think it would be two years ago this fall I was up on the Eldorado ditch and water was running in the ditch. None from Burnt River but from East and West Camp Creeks. [197—141]

Q. About how much water did that deliver or carry?

A. It was a very small amount; I couldn't say.

Q. As much as two thousand inches?

A. No, I don't think at that time, as much as 500 inches, at the time I saw it last.

Redirect Examination by Mr. HUNTINGTON.

Q. When was it you were there and saw the water discharged as you have just stated?

A. I think it was last fall.

Q. The fall of 1908?

A. The fall of 1908, I think it was. I wouldn't be positive but I think it was 1908.

Q. Could you give us the month?

A. I don't believe I could now unless I was in the office, but I think it was probably October.

Q. Was that the occasion when an engineer by the name of Field went up to look over the creek?

A. Yes, sir.

Q. It was on that occasion? A. Yes, sir.

Q. You saw a stream flowing in the creek then which discharged into Willow Creek?

A. Yes, sir.

Q. Was there any measurement made of the amount of water? [198—142] A. Yes, sir.

(Testimony of I. W. Hope.)

Q. But you don't remember what it was?

A. No. It was measured at two or three different places.

Q. Could you give us the estimate of the width and depth to your best recollection?

A. My recollection would be that it was about four feet wide at the top and probably six or eight inches deep, but really I don't remember.

Recross-examination by Mr. HART.

Q. Are you sure it was in 1908 or 1907 when you were there?

A. I think it was 1908.

Q. Did you follow the ditch along to see whether or not it delivered water into Willow Creek—did you follow all along to Willow Creek?

A. No, I didn't follow the ditch all along to Willow Creek but we was down onto the tributary, onto where it flowed into Willow Creek, known as the "Clayton-Cole Mine" and followed the ditch along to where it crosses the summit.

Q. But you didn't follow it to Willow Creek?

A. No, sir. [199—143]

Re-redirect Examination by Mr. HUNTINGTON.

Q. Did you follow it along far enough to determine whether the water flowing in the ditch would empty into Willow Creek?

A. We didn't follow down to the point where it did empty in, but we followed it down to the summit, and then the ditch runs back onto the Burnt River side of the mountain, and then we crossed the water of the ditch down near Malheur—

(Testimony of I. W. Hope.)

Q. Is that on the Willow Creek watershed on this side of the divide where you last saw the water?

A. Yes, sir.

Q. Could that water flow into any other channel other than Willow Creek from where you saw it?

A. No, sir.

Q. You say this Eldorado ditch crossed several tributaries, as I understand it, of Burnt River. Do these tributaries furnish a considerable amount of water to the ditch?

A. Yes, sir. There was quite a nice stream running into the ditch coming from those tributaries.

Q. So that if the ditch was broken above those tributaries, and between there and the point where it takes water out of Burnt River, still there would be water in the ditch from those tributaries?

A. Yes, sir.

Witness excused. [200—144]

At the hour of 11:50 o'clock A. M., July 22d, 1909, adjourned until 1:30 P. M. to-day.

At the hour of 1:30 o'clock P. M. July 22d, 1909, met pursuant to adjournment as above. Present: Same as before.

[Testimony of W. P. Harris, for Complainant.]

W. P. HARRIS, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. Mr. Harris, you reside in Willow Creek valley, do you? A. Yes, sir.

Q. In what part of the valley do you reside?

(Testimony of W. P. Harris.)

A. About seven miles above here.

Q. Above Vale? A. Yes sir.

Q. Is that above or below the Scott place?

A. It is about 14 miles from the Scott—about seven miles above Vale.

Q. About seven miles below the Scott place?

A. Yes, sir.

Q. How long have you lived in the valley?

A. About—well, I have lived up on this place about eight years.

Q. Where did you live before that—in this county or elsewhere?

A. Yes, sir, I have lived in this county since the fall of [201—145] 1883 except one year I was in California.

Q. Does the stream of Willow Creek flow through the land you own? A. No, sir.

Q. Does it flow through any land you are farming? A. Yes, sir.

Q. During the time you have lived in the valley have you observed the conditions with respect to the water flowing in the valley?

A. Yes, sir, pretty well.

Q. What is the fact as to there being flood waters in ordinary years during the spring?

A. Well, as a general thing there has been flood waters nearly every year since I have been here, except last year and this year.

Q. Are those floods sufficient so that the water overflows the banks of the channel of the creek?

A. Yes, sir. As a general thing, yes, sir.

(Testimony of W. P. Harris.)

Q. Do you farm any land that is overflowed in this way and is not irrigated in any other way?

A. Yes, sir.

Q. What do you raise upon it?

A. Wild hay.

Q. Was there any overflow, or was there sufficient overflow during the season of 1908, or the season of 1909 to inundate your lands?

A. No, sir.

Q. When your lands are inundated in the spring—

Mr. HART.—May I ask a question, Mr. Huntington? Is the land at issue a part of your land?
[202—146]

Mr. HUNTINGTON.—No, sir, it is not a part of our land.

Mr. HART.—Objected to for the reason it has no reference to the lands embraced in the issues, and is incompetent.

Q. What is the fact as to the crop you get from them?

A. Well, generally a pretty good crop of hay.

Q. What kind of hay is it?

A. Well, it would be rye grass and blue joint and redtop and such as that.

Q. When the lands are not inundated by the spring overflow what is the fact about your crop?

A. Well, we had none at all—I have not had any for the last two years.

Q. Are you acquainted generally with the condition up and down the creek of the lands?

(Testimony of W. P. Harris.)

A. Yes, sir, in a certain way. Of course, I have generally—I have not been ranching any until the last, oh, about five or six years. Before that I was drilling wells and the like of that, so that I wouldn't pay extra attention only to what I would see.

Q. Are the conditions of your land and the kind of crop you raise on your land—it is all about the same as the conditions surrounding and the crops raised upon the road lands up and down the creek?

Mr. HART.—Objected to because the witness has not shown he knows anything about any other lands except those he is farming [203—147]

A. Well, I should judge they are about the same. There is no land on the creek that overflows but what would depend upon the overflow of water for making a crop.

Q. What is the result upon the flow of water in the creek after the flood waters have receded when you have had a flood in the spring?

A. Well, we generally have water until middling late. At my ranch it would generally run from the first of June until the middle of June, and I have had the water running until the 16th of July in my ditch coming out of the creek.

Q. Do you have a water ditch so that you take some water out of Willow Creek when the water is flowing there? A. Yes, sir.

Q. Is that on the land you leased or on your own land? A. On my own land.

Q. When there is no flood water in the spring

(Testimony of W. P. Harris.)

what would be the effect on the flow of water in the creek?

A. Well, there has not been any—I have not had a bit on my land for these last two years.

Q. That is, do you mean there is no water at any time opposite your land?

A. Yes, sir, there has been a little along somewhere in February for the last two years in the creek, but after that there hasn't been any to amount to anything. Well, not, you would say, after it had receded from the spring freshet. [204—148]

Cross-examination by Mr. HART.

Q. You say during 1908 and 1909 there was no water in any of the channels of Willow Creek after February?

A. Well, some time about that time; yes, sir.

Q. You meant by that that the channel wasn't full of water, didn't you?

A. I meant there wasn't any in it at all.

Q. Well, the channel was full of water during 1908 and 1909—there wasn't any overflow but the channel was full?

A. No, sir, neither one of those years.

Q. And you say there was some water in the creek during February? A. Yes, sir.

Q. And did it fill up the whole channel?

A. No.

Q. And there was no overflow? A. No.

Q. Is there any water in the creek now?

A. No.

Q. Perfectly dry all up and down the creek?

(Testimony of W. P. Harris.)

A. Except the holes.

Q. These little holes are where little springs are?

A. It is where the gravel is either dug out or has been washed out, you understand, by their having dams in and the water *puring* down until you get to this second flat or first flat, rather.

Q. And then there is water only in that little hole? A. I suppose so. [205—149]

Q. It is a kind of a spring?

A. It is a kind of underground water we have all through here.

Q. And it flows all the time?

A. I suppose so.

Q. The last two years have been the driest seasons that have ever been here—it is there now?

A. It is.

Q. It must have been there all the time since you have been here? A. Yes, sir.

Q. Every season it gets down to about the same as it is now?

A. I suppose so. I can't see under the ground but I should judge so.

Q. I am not speaking of the water under the ground, but about those holes of water that you did see; they are about the same?

A. We dip them out and scrape them out until we come to surface water.

Q. And it is just about the same every year, the quantity of water in these holes are just about the same every year? A. Well, I suppose so.

Q. Now, you also spoke a moment ago at times

(Testimony of W. P. Harris.)

the channel being full of water and being flood water? A. Yes, sir.

Q. How wide does it get there at your place at times?

A. Of course, it would be a guess, but I should judge from a quarter to half a mile; that is, different places along the creek.

Q. And when it gets to that shape that is about the average condition as the years go by?

A. Yes, sir. [206—150]

Q. And it moves pretty rapidly as it flows down toward the Malheur River and the sea, and at times it is a really dangerous stream to cross?

A. It is; yes, sir.

Q. About how deep would you say the water was at those times? Did you ever swim a horse across it? A. I have at times in the channel.

Q. About what would be the average depth?

A. That would have to be a guess.

Q. Just your best judgment. A guess is nothing but your judgment is figured on what you have seen for years.

A. I would judge it would be something like a foot and a half maybe for—well, from a half a foot to a foot and a half.

Q. From a half a foot to a foot and a half would be as it goes down?

A. That would be the average.

Q. That would not be the average where a horse would swim?

(Testimony of W. P. Harris.)

A. No, I would try to average the stream across the creek.

Q. A half to a foot and a half would be the average of the stream across the creek?

A. I should judge so.

Q. You said you raised some crops upon your place?

A. Yes, sir.

Q. What is your first name, Mr. Harris?

A. W. P. Harris.

Q. And you live over this side of Mr. Scott's?

A. Yes, sir.

Q. And you only get the water he doesn't use and the neighbors above you?

A. Yes, sir. [207—

151]

Q. And if they can take the water out and use it they have the first right?

A. They do.

Q. And anybody above Mr. Scott would have the right to take it out and use it too?

A. I suppose so, if they had the prior right.

Q. How much land is that you own, or farm rather, that Willow Creek flows through?

A. 160 acres.

Q. That land is not owned by the company?

A. No, sir.

Q. And you raised some grass upon that?

A. Yes, sir.

Q. Rain and snow falls every year up through the valley during January and February and March?

A. Generally, except in the last couple of years.

Q. It didn't do that in the hillsides the last two years is the reason you didn't get a flood?

(Testimony of W. P. Harris.)

A. Yes, sir.

Q. But you do get about as much snow or rain-fall as they do anywhere else in the valley?

A. Yes, sir.

Q. That of itself makes the soil through the spring muddy, through the months of February and March—muddy and saturates the soil?

A. To a certain depth.

Q. And as far as the water goes?

A. I suppose so.

Q. And even with that condition existing you have seen the soil on top so that wagons and horses would be stalled in the mud? A. Yes, sir.

[208—152]

Q. And you have seen it also in the road and that occurs as the usual annual occurrence?

A. Yes, sir.

Q. And whenever you have the flood waters—enough rain to make the flood waters, why that valley is all muddy each year occasioned by the rain and snow falling on it?

A. No, sir, whenever it begins getting *muddy* the flood waters there raise. It doesn't get muddy until it melts.

Q. Wasn't it muddy this last year without flood water? A. A little; yes, sir.

Q. Doesn't it get muddy any place where it never overflows it? A. No.

Q. And those places where it gets muddy where it never overflows is occasioned by the rain and snow falling upon it, isn't that true? A. Yes, sir.

(Testimony of W. P. Harris.)

Q. Now, Mr. Harris, do you know the location of any of the company's property?

A. Yes, sir, I know some of it.

Q. Have you ever farmed any of the company's property?

A. I have cut hay on some of it. That is, what I suppose is the company's property, you understand. Of course, I don't know what is in this suit.

Q. "What you suppose is the company's?"

A. Yes, sir.

Q. I will ask that the answer be stricken out then if you don't know. Are you familiar with any of the creeks flowing into Willow Creek, such as Gum Creek, Fox Creek— [209—153]

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. I know of them since I have been in the country.

Q. And if they get high when the snow and rain falls in the mountains out there and melts and it comes down and that water overflows on that land, isn't that true?

Mr. HUNTINGTON.—That objection goes to all of this testimony.

Mr. HART.—That is all right; yes, sir.

A. Yes, sir.

Q. Can you tell me the number of creeks that flows into Willow Creek from above your property or in the vicinity of your property, say from three or four miles up and down, clear up on this side of Mr. Emory Cole's?

(Testimony of W. P. Harris.)

A. Well, I might if I would figure for awhile.

Q. Name those you can name, that is all.

A. Well, there would be Gum Creek—or not Gum Creek, but Little Willow Creek, Kern Creek, Gum Creek, Black's Creek, Pole Creek—well, that is all that I know of from here to Cole's.

Q. Now, those are all on the west side of the valley, aren't they?

Mr. HUNTINGTON.—Objected to as not proper cross-examination and leading.

A. Yes, sir.

Q. Now, those on the east side, how many can you name over [210—154] there?

A. Well, there is not—well, there is one or two.

Q. Fox Creek? A. Yes, sir, that is one.

Q. Baker Creek? A. Yes, sir.

Q. Do you know of any others?

A. No, sir.

Q. These various creeks I have mentioned they drain the hills of the valley for 25 miles as they go up? A. Yes, sir.

Q. They drain a watershed of about how many square miles?

A. Well, I wouldn't want to try to answer that question at all, because—

Q. Well, about how far back on the right-hand side, or the east side, is it before you reach the top of the mountains from the valley—from the creek itself, the thread of the creek to where you reach the top of the mountains?

A. Oh, it would be something between five and seven miles.

(Testimony of W. P. Harris.)

Q. How far would it be from the creek itself on the west side before you reach the top of the mountains? A. Somewheres near the same.

Q. Then they drain an area of over 14, to at least 14 miles in width running back 25 miles up to Cole's place, these creeks that you have mentioned, with any others that are there?

A. Yes, sir, I suppose so.

Q. Now, all the water that may fall in that watershed, and with any other shed that may exist that you have not mentioned eventually finds its way into Willow Creek? A. Yes, sir. [211—155]

Q. And occasionally you say that it comes down in quite large volumes, depending upon the rain or snow, and they contribute to the flood waters that may come down Willow Creek? A. Yes, sir.

Q. I wish you would give a description of the land you own.

A. Mine is the northwest quarter of Section 26, Township 17 South, Range 44 East.

Q. Is that just the quarter?

A. That is my own land.

Q. What land is it you rent?

A. It is what is called the Fox or Hartle place.

Q. How many acres—do they own that now?

A. Yes, sir.

Q. Does it adjoin your property?

A. It corners on; yes, sir. That is on Section 24, the Hartle place.

Q. Do you know the description of theirs?

A. It is the west half of the southwest fourth and

(Testimony of W. P. Harris.)

the southeast fourth of the southwest fourth and the southwest fourth of the northwest fourth.

Q. The total amount of the land you have leased is how much? A. 160 acres.

Q. 160 acres? A. Yes, sir.

Q. How much do you pay yearly rental for that?

A. Well, sir, that is—when it is a bad year like last year I don't pay so much.

Q. How much did you pay last year?

A. \$75.00.

Q. For 160 acres? [212—156]

A. Yes, sir.

Q. How much did you pay this year?

A. Well, there has been no real agreement made this year. I have not paid anything so far.

Q. What did you pay the year before?

A. I paid \$100.00.

Q. You paid \$100.00 for 160 acres the year before last? A. Yes, sir.

Q. Is your land all fenced, that 160 acres?

A. My individual land?

Q. No, this leased land?

A. It is very nearly all fenced; there is a little corner left out.

Q. Do you raise anything except grass?

A. No, sir.

Q. You spoke of flood waters. About what time do they usually occur?

A. Well, as a general thing we generally have a break-up along in February, and then generally it tightens up after that and we have another break-

(Testimony of W. P. Harris.)

up along in March or later.

Q. Which is the bigger, the one in February or the one later? A. The one later.

Q. About how long does the one in February lay on the ground generally?

A. Only a short time.

Q. About how many days?

A. Oh, I should judge now it would be something like a week or such a matter.

Q. And the one in March, about how long would that stay on the land?

A. That is the one I am speaking of. Of course, when we [213—157] generally have the big flood in March, why, it generally flows from that on until it recedes.

Q. Yes, sir, I know, but how long does it stay in its flooded condition?

A. Well, of course it would be a guess. I should judge it would be something like, oh, maybe a month.

Q. You think it would stay on maybe a month?

A. Yes, sir.

Q. And during that time the water is continuously running on down rapidly to the sea?

A. Yes, sir, but, of course, it recedes a little all the time as the water runs off.

Redirect Examination by Mr. HUNTINGTON.

Q. Mr. Harris, the counsel has asked you about the current, and about its being dangerous to cross the stream. Is it dangerous except in the channel of the creek? A. No, sir.

Q. When you speak of it being dangerous you

(Testimony of W. P. Harris.)

mean right where the channel is deep?

A. Yes, sir.

Q. You have said the average depth of the water would be a foot and a half or two feet, as I remember your testimony. Did you mean including the main channel of the creek itself or outside of the channel? [214—158]

A. I was trying to include the main channel of the creek and all as near as I could.

Q. Eliminating the channel of the creek, about what would be the depth of the water on land that overlies the surface of the bank along the creek?

A. Well, that is getting in deep water, of course, and a person would have to make a guess at it, and I suppose it would run, of course, from nothing to something like a foot, maybe. Eight or nine inches to a foot, or something along there.

Q. Is there much current then outside of the channel itself in the water?

A. Why, no great sight of current.

Q. The main current, as I understand you, is right in the channel of the creek?

A. Yes, sir, it would be in the main channel of the creek.

Q. The land you farm—the leased land—adjoins the tract which is owned by the Eastern Oregon Land Company, doesn't it?

Mr. HART.—Objected to as incompetent, as witness has said he didn't know what the Eastern Oregon Land Company owned except something he had heard.

(Testimony of W. P. Harris.)

A. It is right east of Section 23, which had ought to be road land, and, of course, it would be joining.

Q. Is your land about the same as other land in Section 23?

Mr. HART.—Objected to as incompetent and expressing an opinion, and also involving land not an issue involved in the complaint.

Judge WEBSTER.—You mean the land north of you? [215—159]

WITNESS.—I am speaking of Section 24 that I have leased. West.

Mr. HART.—Objected to as not proper cross-examination.

WITNESS.—(Answering previous question.) Yes, sir.

Q. With respect to the seepage of the water, or this water standing in the creek: Did I understand you to say the same amount of water is to be found in the bottom of the creek during the years at this season of the year, during the years when there is no flood as is found there during seasons there when there is not a flood?

A. There is none in the creek bottom. If you dig down deep enough you will find this underflow but not in the creek.

Q. It is not in the creek itself?

A. No, sir.

Q. About how deep do you have to go to get that below the bottom of the creek?

A. Of course, that would vary according to the bedrock in different places along the creek, and, in

(Testimony of W. P. Harris.)

the Fox field it would be something, this year, like a couple of feet below the main flow of the creek.

Q. Now, when you have flood water in the spring, sufficient to overflow the valley, and when that water stands as you say it usually does over the valley, what about the water in the channel of the creek at this season of the year? Is there any difference between last year and this year?

A. Well, there would be before this, but at this time of the year it generally dries up about this time of the year.

Q. Up to this season the conditions would be the same, but at this season and from then on, as I understand you, the conditions would be about the same?
[216—160]

A. Yes, sir.

Q. What would be the difference prior to this season?

A. Well, as I stated before, there is generally water running in the creek every spring from the flood until about the first and the middle of June. A pretty fair head of water.

Q. This year and last year it ceased about when?

A. Well, there hasn't been any come down at all except along in February now. There was just a little along in February.

Q. The counsel led you to say that there was an underground stream there. Do you mean to say that this season of the year you could see water running in the channel of the creek?

A. No, sir.

(Testimony of W. P. Harris.)

Q. You could only dig down to it?

A. Yes, sir.

Q. Now, with respect to these creeks you have named, concerning which the counsel went into, but about which I didn't ask you on direct examination. Isn't it true, Mr. Harris, that those creeks, all of them, with the exception possibly of Pole Creek, are short channels that go up onto the sides of the hills and the water in the spring when it starts to go off flows off in a few days, isn't that the fact?

Mr. HART.—Objected to as leading.

A. Well, it doesn't take it very long.

Q. Are they creeks which continue to run for any length of time? A. No, sir. [217—161]

Q. Is there any water in any of them after the spring freshets?

A. Not to amount to anything. There might a few of them run a short time, but then they are what you would naturally call a short life creek or a freshet creek, or something of that kind. The water sinks at the head of the creek after the spring freshet. It sinks and doesn't run all the way down.

Q. How does the amount of water which comes into the channel of Willow Creek in these streams compare to the amount of water that comes down the main channel of Willow Creek?

A. Well, that is a pretty hard question.

Q. Well, I will put it in a different way. Does that main body of water flowing in Willow Creek during the spring freshets come from these side streams you have mentioned or from the main chan-

(Testimony of W. P. Harris.)

nel of Willow Creek?

A. Well, when we have warm weather down here it is not as warm of course up on the upper creek, and we might have the water, more of it *m* down on these low hills quicker than above, and at that time they would be larger streams down here than in the main Willow Creek.

Q. Take it the season through when there is water flowing in Willow Creek, where does the main body of water come from, these side creeks or the main channel?

A. It has to come from the main channel, of course, to take the season through.

Q. Counsel has asked you about the roads and the land in the valley becoming muddy through rain and snow. As I understand you, you said that moisture would go down as far as there was any moisture to go?

A. Yes, sir.

Q. Does that moisture saturate the earth down to bedrock? [218—162]

Mr. HART.—Objected to unless witness has dug down to see.

A. No, sir.

Q. Will the surface of the ground become muddy before the ground is saturated down to any depth?

A. Yes, sir, it will. I am able to answer that question, too.

Q. How do you know that fact?

A. Because I have dug and found out at different times.

Q. Now, when the water stands upon the land

(Testimony of W. P. Harris.)

when the lands are inundated by these freshets, what is the fact as to the land becoming saturated down—

A. Well, that is on the low land. Where it is flooded it generally saturates from the top down.

Q. Clear down to the gravel? A. Yes, sir.

Q. I think you said that you had seen horses swim across where the land was flooded. Did you see them swimming except in the channel?

A. No, sir.

Recross-examination by Mr. HART.

Q. You say when the land is flooded by water the land is saturated by water. Did you ever dig down or did you just reason that out?

A. No, sir, I have dug that out—I have been digging wells. [219—163]

Q. When the water receded did you immediately dig down? A. Yes, sir, I have.

Q. Where were you digging the wells?

A. There on the Hartle place.

Q. That is on your land? A. Yes, sir.

Q. And if there is any water at all it naturally flows down to the lower levels? A. Yes, sir.

Q. And you spoke about the size of these creeks you have mentioned and told us about. You are familiar with the length of Gum Creek, are you?

A. Well, no.

Q. Then, you didn't wish to make the answer that it was a short creek?

A. Oh, well, I could see the top of the hill. I am familiar with that.

Q. I will ask you, as a matter of fact, if it isn't

(Testimony of W. P. Harris.)

something like 15 or 20 miles in length—Gum Creek—and I am going to ask you to go up and see some water running into it, too. A. Well, no.

Q. And I will ask you if Little Willow Creek isn't also 15 or 20 miles in length?

A. Yes, sir; yes, sir.

Q. All of these creeks you have stated flowed into Willow Creek below the Cole property?

A. Yes, sir; that is on the west side.

Q. Now, I will ask you if, as a matter of fact, that Gum Creek, and Sheep Corral Gulch—the creek running down there—and possibly Current Creek, if they don't flow the year around and if there is not water flowing into them to-day? [220—164]

A. At the head; yes, sir.

Q. To-day, right up here in the valley?

A. No, sir.

Q. Are you willing to go up there to-day and see if the water is not running down there?

A. What have you got—an automobile? Well, sir, I have lived here quite a spell and, as a general rule, I have never seen any water where the road crossed by here.

Q. Have you ever been to Gum Creek where it comes down from the mountain to Willow Creek at this season of the year—through July, and August and September?

A. Yes, sir, I have—no, I will take that back, Gum Creek is—was it Gum Creek?

Q. I am speaking of Gum Creek.

A. Gum Creek might have a little bit of water,

(Testimony of W. P. Harris.)

and also Black Creek, but none of the rest of them has got any water. None of the rest of them have.

Q. You had stated that. Well, as a matter of fact, Gum Creek and the other creek—Black Creek—do have water flowing in there throughout the year? A. Yes, sir, all the time.

Q. They have water flowing in them all the time and that water runs down into Willow Creek there above the ground, or down in the channels below.

A. Yes, sir.

Q. And that is that water if you could only dig down, the continual flow of Gum Creek and Black Creek— A. I don't know.

Q. That is a reasonable statement of your knowledge? You would draw that reasonable statement?

A. I guess so. [221—165]

Q. I will ask you if Little Willow Creek isn't running water to-day? A. At the head?

Q. Down at the base of the mountain?

A. It might be.

Q. I will ask you if it doesn't do it continually, when Willow Creek down where you are is dry, those streams are always running?

A. Just a trifle of water, yes, sir.

Q. And it has enough water when collected together down in the bed of Willow Creek to make that water you pump and take out?

A. I suppose so.

Q. Then, if it wasn't for that water Willow Creek would be entirely dry?

A. That or some other.

(Testimony of W. P. Harris.)

Q. Do you know of any other?

A. No, sir, I don't.

Q. That is the only water you know of?

A. I never followed it.

Q. You never followed it, but you know it comes?

A. Yes, sir.

Q. Well, sir, having corrected your evidence and refreshed your mind, I will ask you to go up and look at it to-night.

A. You get me so mixed up. [222—166]

Re-redirect Examination by Mr. HUNTINGTON.

Q. Can you tell the water you speak of, which you say you can find by digging down in the bottom of the channel through your place comes from these trifling streams which you say flow a trifle of water from water which started in the main channel of Willow Creek and came into the valley from that source?

Mr. HART.—Objected to as assuming something not testified to and as incompetent.

A. No, sir; nothing but a supposition.

Q. The water that you get by digging, as I understand you, is the water that is in the strata of gravel underneath the bottom of the channel on the bottom of the creek? A. Yes, sir.

Q. How much land do you think could be irrigated from the water that flows in any or all of these smaller creeks that the counsel has called your attention to during the spring of the year from April until June?

Mr. HART.—Objected to as not proper redirect

(Testimony of W. P. Harris.)

examination. Witness hasn't shown he can say how many hundreds or thousands of acres.

A. That is a question I don't care about trying to answer. I will tell you: Here is the idea: You take the creek in a certain place and there is about a certain amount of water, and it keeps sinking all the way down. The lower you get on the creek the less you will have. And for [223—167] that reason it is a pretty hard proposition to answer. Now, if there is any stated place and I knew of about the amount of water that would be running at that place, why then I could have some idea, and without that I couldn't state or wouldn't want to.

Q. Do any of these creeks, so far as you know, discharge any water now directly into the channel of Willow Creek?

A. I have not been up Willow Creek so as to know about Black's Creek or Gum Creek, but they are the only ones that generally furnishes water, and there might be some running there, I don't know.

Re-recross-examination by Mr. HART.

Q. You spoke of irrigation. How many miner's inches of water under a six-inch pressure is usually considered proper in this valley?

A. I am sure I don't know about that. As a general thing we just use what they term a weir.

Q. Can you express in miner's inches on a weir dam the quantity of water?

A. No, sir, I wouldn't try to do anything like that.

Q. Do you know whether it is as much as four

(Testimony of W. P. Harris.)

inches to the acre or three inches to the acre?

A. No, sir, I don't.

Q. You don't know that? [224—168]

A. No, sir; that is out of my line.

Q. And therefore you couldn't tell how many acres could be irrigated by a quantity of water?

A. No, sir.

Witness excused.

[**Testimony of J. S. Edwards, for Complainant.**]

J. S. EDWARDS, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. You reside in Vale now?

A. At the present time.

Q. What is your business?

A. Well, I am in the banking business a little, and ranching.

Q. What bank are you connected with, and what is your position?

A. The First National, and I am president at the present time.

Q. Have you ever lived in the Willow Creek Valley? A. Yes, sir.

Q. How long did you live there?

A. Oh, I have lived there for a good many years.

Q. Approximately how long?

A. Oh, I have been up there and here together since 1871; that [225—169] is, most of the time.

Q. Do you still own land through which Willow

(Testimony of J. S. Edwards.)

Creek runs? A. Yes, sir.

Q. Have you observed the conditions which existed there in Willow Creek during the years you have lived there as to the water supply?

A. I guess I have.

Q. I wish you would state about the waterfall, and particularly the conditions which exist in ordinary years? A. In what way?

Q. With respect to the—just state commencing the early part of the season and then on down?

A. In regard to the early water?

Q. Yes, sir, and then the subsequent water.

A. Well, it generally thaws every winter and early spring, and the water comes down and it depends on the amount of snow in the mountains above how long it will last.

Q. Where does Willow Creek have its source, if you know? A. Why, in the Blue Mountains.

Q. Is that a timber country to any extent?

A. It has some, but I don't know how extensive. I have been up to the timber. There are several prongs up in there.

Q. Then, it flows down through the canyon and comes out into the open valley? A. Yes, sir.

Q. Is there any timber along the hills on the east and west sides of the valley below where the main channel comes out of the canyon?

A. Below where the channel comes out of the lower canyon?

Q. Yes, sir. A. Very little [226—170]

Q. Now, in ordinary years to what extent is there

(Testimony of J. S. Edwards.)

an overflow in the valley?

A. Well it depends on the amount of snow in the mountains above.

Q. Take it the usual—the general run of years?

A. Well, some years the water will run in the creek until late in June, perhaps July sometimes. Sometimes it dries up earlier.

Q. Does it ever spread out over the valley?

A. Yes, sir, frequently.

Q. To what extent?

A. It depends upon the elevation of the land. On the low lands it spreads out for maybe a mile. It depends upon how low the land is.

Q. Then later on—about when do these floods come generally?

A. Well, usually they break up in the winter, sometimes January or February, and then again in the spring and keep getting less and less until there is no water. It is gone.

Q. Where the water flows out over the bottom land and inundates it, what is the effect upon the land with respect to the production of the grasses?

A. Well, if they don't get any overflow or water they don't get much hay.

Q. What kind of hay would they get?

A. It is wild hay on that lowland.

Q. Has there been any overflow of the valley outside of the channel of the creek—I mean during the season of 1908 or 1909?

A. No, sir, I think not; but very little, if any. I don't think there was any.

(Testimony of J. S. Edwards.)

Q. What has been the effect of the absence of that overflow [227—171] upon these generally overflowed lands?

A. Why, you don't get much hay. On my land down below here I didn't get any the last two seasons.

Q. What is the effect of the inundation of the valley upon the flow of water during the season after the overflowing water has receded?

A. After it is gone?

Q. Yes, sir, is there any more water flowing in the creek in the channel of the creek after the flood waters have receded during the seasons when there has been the usual flood than there is when there has been no overflowing?

A. The more snow and the more flood why the later in the year the water will come.

Q. What effect does this overflowing have with respect to saturating the soil after it?

A. The more water they have over the land the more hay you get.

Q. Well, how late in the season does the water ordinarily flow past your place; that is, when there has been the usual spring freshets?

A. I have a place up here about four miles, and another one—

Q. Mention both.

A. It will run farther up later and down lower maybe it will come for three or four weeks. And farther up it will run later.

Q. Is there any difference with respect to that

(Testimony of J. S. Edwards.)

subsequent flow in years when there is no flood from the years when there is a flood?

A. Well, when there is not much snow there is not going to be a flood, and, consequently, not much water and it will dry up earlier. [228—172]

Q. Does the soaking of the valley above have anything to do with the water in the creek afterwards?

A. Well, I hardly know. If the ground were full of water it would naturally keep coming on down later, I suppose.

Q. What would be the effect on these lands that are ordinarily overflowed if you deprive them of that overflow water?

A. Well, they wouldn't be worth much if you deprived them of the overflow water, and you wouldn't get much hay.

Q. Could they be used for any other purpose?

A. You would have to have irrigation of some kind, either early or late.

Q. But if they were not irrigated at all they would produce nothing?

A. If they are not irrigated they will not produce anything; at least I didn't on my place up here.

Q. Will the one saturation of the ground by the overflow in the spring resulting from these inundations enable one to raise a crop on them?

A. Yes, sir, if they get a good soaking early you can raise a crop of hay.

Q. Prior to the last two years did you get crops of hay from your lower ranch?

A. Three years ago it was pretty light, but I got

(Testimony of J. S. Edwards.)

some, and it varies according to the amount of water I have.

Q. And for the last two years you got nothing?

A. No, sir.

Q. Take it prior to 1907, what amount of crop were you able to get during the years when it was flooded? A. On this lower place?

Q. Yes, sir.

A. I got crops every year; some years they were good and some years they were lighter. [229—173]

Cross-examination by Mr. HART.

Q. Mr. Edwards, I understood you to say you had two places, one situated out of town a short distance?

A. Yes, sir.

Q. And the other one up the valley?

A. Yes, sir.

Q. The one up the valley, is it beyond Mr. Scott's place? A. Yes, sir.

Q. Now, the valley, as it runs down this way, expands and widens out clear from Mr. Emory Cole's place there at the mouth of the canyon?

A. Well, it varies a little after it gets down too; it varies more.

Q. I understood you to say when you had floods that the water continued to run in Willow Creek up until about June? A. Some years.

Q. It does some years? A. Yes, sir.

Q. And even when the floods were on some years it dried up before that?

A. Well, of course, we might have a flood any time and not much snow and naturally it would go

(Testimony of J. S. Edwards.)

away earlier and slack up.

Q. And the condition of Willow Creek as it exists, floods or no floods, through the months of July, August and the last of June every year is about the same, isn't it?

A. Well, to a certain extent; some years are later than others.

Q. But there is very little difference? [230—174]

A. It generally gets pretty short up in June.

Q. Now, you also stated that the water ran a little later at your upper place than down at your lower place?

A. Yes, sir.

Q. And how many miles of Mr. Scott's is yours—the upper place, I mean?

A. Something like ten or twelve miles.

Q. Your property, then, is right close to the Cole property?

A. Just below a little; he has some in the same section with mine.

Q. Yours is just a little below his?

A. Yes, sir.

Q. That, of course, is closer to the mountain streams coking down the gorge and down the mountains on both sides than this lower place and it is this water that keeps the water running later?

A. Yes, sir, and the snow melts later on.

Q. The snow melts later on?

A. Yes, sir, the snow melts later and the water is used in the neighborhood of the upper place and don't get on down to the lower place.

(Testimony of J. S. Edwards.)

Q. The idea, though, that you intend to convey by your evidence is that this late water that runs into the creek is this new water that snow melts? That is the reason?

A. Yes, sir, one reason, and the people use it up there and they use it up before it gets to the lower ranches.

Q. The people up there use it before it gets to the lower ranches? A. Yes, sir.

Q. Now, there are some banks on Willow Creek—of Willow Creek, that the water very seldom gets over, isn't there? [231—175]

A. Yes, sir.

Q. And these lands spoken of as being flooded are simply low breaks in the banks and the water spreads out over them?

A. That is simply low meadow-land.

Q. And it is because it is naturally lowland that the water can get over them?

A. It is low meadow-land.

Q. The flood time you speak of, you mean by that, don't you, the period of time when there is a continuous stream running down Willow Creek?

A. The melting of the snow makes the rush of water.

Q. And that water travels slow or fast?

A. The channel has quite a current, but outside of that it doesn't have much current.

Q. The channel has quite a current?

A. It has a very good current in the channel.

Q. Would you call it a rapid current?

(Testimony of J. S. Edwards.)

A. No, sir.

Q. Could you tell the number of feet, say, in a second?

A. No, sir, I have no idea about that.

Q. When there is a good deal of snow and rain through the rainy season—by the way, when is your rainy season? A. I don't think we have much.

Q. When the rain principally falls?

Z. Of course, in the spring and winter—early spring, but there is not very much.

Q. But that would be January, February and March?

A. That would be the most of the fall of water.

Q. As a general thing, when there is snow and rain in the mountains there is also more or less snow and rain clear up the valley, isn't there? [232—176]

A. Not always. Sometimes there is snow there in the mountains and very little down here.

Q. But yet you look for a fall, and a fall often does occur about the same time?

A. A little. There is very much more in the mountains but it is about the same time.

Q. And the rain and snow falling in the valley, of course, makes it muddy in the valley at times?

A. Yes, sir, to a certain extent.

Q. To such an extent that the horses and vehicles are stuck in the mud?

A. They might be; yes, sir.

Q. And that occurs in places that never is overflowed?

(Testimony of J. S. Edwards.)

A. Yes, sir, when there is snow and rain.

Q. How long did you say you have been living here?

A. Since 1871, in this part of the country.

Q. How long have you owned, Mr. Edwards, the property up near Cole's ranch—the upper place?

A. Oh, I have been there, I think, thirty years—thirty or thirty-five years that I have lived in that neighborhood.

Q. And how long have you owned this lower piece of property? A. Seven or eight years. [233—

177]

Redirect Examination by Mr. HUNTINGTON.

Q. Will the roads and lands get muddy in this country when the ground isn't saturated down any great distance?

A. No, but when the frost goes out it is muddy.

Q. When it is muddy does it always mean that the ground is wet down to bedrock?

A. Down to where do you mean—

Q. Suppose these so-called flood waters you have been talking about were shut off entirely from the upper valley, suppose they were stopped in the canyon, and on that account the lands along the creek were not flooded outside of the banks of the stream, would those lands which you have described as producing hay produce anything?

A. Very little, I think.

Q. What would be the effect to the lands which ordinarily are overflowed, from which you say crops of wild hay was raised, if you should deprive them of

(Testimony of J. S. Edwards.)

the flood water so that they wouldn't be overflowed?

A. Well, if they didn't get any flood water, or any irrigation of any kind, there wouldn't be much hay.

Q. Would it appreciate or depreciate their value?

A. It would depreciate it.

Q. To any great extent?

A. Oh, considerably if they didn't have any way to get water later. [234—178]

Recross-examination by Mr. HART.

Q. The flood water that comes down at times injures some property, doesn't it?

A. Not very much of it, I think. I think it is the other way.

Q. Haven't you seen at times a deposit of debris and mud on those lands?

A. I never seen it but very little.

Q. Haven't you seen it at all?

A. I have seen some but not enough to hurt. It never hurt any of my land.

Q. But if the land were planted out in fruit trees and the water came down that way would it ruin the land? A. I think it would.

Q. It would ruin the land for any other crop of a productive nature except wild grass?

A. Yes, sir; but if you didn't have water of some kind you would not want trees.

Q. One might want water but not flood water?

A. Of course, it would answer the same purpose.

Q. For instance you have water on the upper ranch when you don't have on the lower ranch?

A. It comes later.

(Testimony of J. S. Edwards.)

Q. And it is not flood water?

A. Yes, sir, that is true.

Q. And you could raise trees with your later water that you couldn't use on your lower ranch?

A. Yes, sir, but we don't have orchards where the overflow comes. We put orchards on higher ground and irrigate them. [235—179]

Q. The reason why you don't put an orchard on it is because you are afraid to use the water because it is flood water?

A. If you use flood water it would ruin an orchard on the lower ranch.

Q. You know Mr. Kelly's property?

A. Yes, sir.

Q. He dug a ditch, didn't he, so as to prevent his land from being flooded?

A. Partly for that purpose.

Re-redirect Examination by Mr. HUNTINGTON.

Q. Assuming that you had no water right; that is, no right to the use of water flowing in the stream throughout the season which you could handle there through ditches and apply to the land as you saw fit, then, as I understand you, you wouldn't attempt to use these overflowed lands for any purpose except the natural grasses that grow upon them?

A. That is all, just the wild hay that naturally grows there.

Q. The sediment which the counsel has asked you about that is brought down with the spring flood, is that an injury to the ground or a benefit?

A. Of course, if it would come enough of it it

(Testimony of F. O'Neil.)

might do damage in some places, but, as it is, it is a benefit because it spreads sediment over the ground and enriches it every year.

Witness excused. [236—180]

[Testimony of F. O'Neil, for Complainant.]

F. O'NEIL, a witness produced on behalf of the complainant, after being duly sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. You reside here in Vale at the present time?

A. Yes, sir.

Q. Have you ever resided on Willow Creek?

A. Yes, sir.

Q. How long did you live there?

A. I came in there in 1881 and I owned a place there ever since.

Q. How far is your place from the Scott place?

A. Just about a mile.

Q. This side? A. This side.

Q. Does Willow Creek flow through your place?

A. Yes, sir.

Q. Since you have lived there have you observed the flow of water through the valley there in Willow Creek? A. Yes, sir, pretty much every year.

Q. About when do the spring floods begin ordinarily?

A. I have seen them in January and February.

Q. And how late in the season do they continue?

A. I have seen them, I think, in May. I was shearing sheep at the time.

(Testimony of F. O'Neil.)

Q. You have seen them from January all the way down to May? A. Yes, sir.

Q. Are those floods sufficient so that the water overflows the banks of the stream?

A. I have seen it that way. [237—181]

Q. Now, what is the condition in ordinary years in that respect? Is it usual for the banks to be overflowed so that the water stands on the flat land?

A. Not where I live.

Q. Take it in other parts of the valley?

A. I have seen it up there above and down near town here; I have seen it in low places.

Q. When the water floods onto those lower lands and inundates them in the spring, what, if any, crop will grow upon the land?

A. Well, I am not sure of that because I have not been living where that happened. My ranch was always dry excepting when there was a very severe flood. It would spread out maybe a hundred yards and had no crop on it.

Q. Did you depend upon the overflowed lands at all to irrigate your ranch? A. Yes, sir.

Q. Did you irrigate the ranch through ditches?

A. Yes, sir.

Q. Well, now, in seasons when there is no spring flood about how is the flow of the creek, the flow of the water in the creek opposite your place when there is no spring flood? A. It gets pretty low.

Q. When do you begin to irrigate usually?

A. Well, I have begun in March. Just as soon as the creek starts in to run we generally start in to

(Testimony of F. O'Neil.)

irrigate; that is, when it is convenient.

Q. And when you have no spring floods at all and the water does not overflow the valley, how late does the water flow in the creek? Does it dry up earlier?

[238—182]

A. It dries up earlier where I live.

Q. How much sooner?

A. A good deal sooner; and this year it had none at all you might say.

Q. Suppose the flood waters which come down the main channel were stopped in the canyon above the valley, and were not allowed to come down in the valley at all, what would be the effect upon the riparian lands along Willow Creek?

A. Well, we would raise nothing that I know of.

Q. They would get no water?

A. No, sir, not where I live; where my ranch is. The creek is deep there.

Cross-examination by Mr. HART.

Q. Mr. O'Neil, the floods you speak about are not a regular annual occurrence, are they?

A. It don't seem to be; no, sir.

Q. Occasioned by some peculiar condition—atmospheric condition—there seems to be heavy snow or rainfall in the mountains, and when it melts then you have a flood?

A. Why, it is—my idea is that it is the different state the ground is in. If it is frozen hard when this freshet comes it runs off quick, and if it is not frozen hard it soaks in.

Q. Is the ground frozen hard often when the

(Testimony of F. O'Neil.)

freshets come? [239—183] A. Yes, sir.

Q. Then, it does not saturate the ground very much? A. No, sir, I don't think it does.

Q. That occurs three-fourths or four-fifths of the time? A. I couldn't answer that question.

Q. About what proportion would you say? As much as four-fifths of the time the ground is frozen when the spring freshet comes?

A. Oh, I couldn't say but it happens that way sometimes.

Q. Now, there isn't any surety even of spring freshet sufficient to get the water above the creek banks—that doesn't happen all the time, does it?

A. Not where I live, it don't happen all the time. My land is high and the creek is deep where I live.

Q. And at times the water doesn't rise sufficient even at other places to overflow the banks of the stream? A. I don't know.

Q. That is true this year, isn't it?

A. I guess it was this year.

Q. It was true of last year? A. Yes, sir.

Q. It was true of '96?

A. I don't remember.

Q. There is more than half the time when you don't have any floods or freshets at all—the water doesn't run over at all?

A. Oh, I don't think half the years.

Q. Don't you think it has been half the time since you have been here that has occurred, barring out some heavy rains or water spouts occurred that one of the witnesses testified about yesterday, why there

(Testimony of F. O'Neil.)

isn't an overflow half the time?

A. Oh, I guess there is. We had it there in the 80's; the [240—184] water didn't overflow every year, but since then we have.

Q. How long have you lived there?

A. Since 1881 I owned the ranch.

Q. Can you describe your ranch, Mr. O'Neil?

A. I think part of it is on thirty-two, just opposite Scott's there, on this side of Scott's.

Q. Section what?

A. Well, sir, I have a very bad memory about land.

Q. What Township and Range is it?

A. I don't remember; I couldn't tell you. Thirty-one is between him and I, a part of it.

Q. How long has it been since you have lived up there?

A. Well, I have been back and forwards ever since I left. I left there in 1886. I run the ranch though and attend to the business.

Q. These spring freshets you speak about occur sometimes as early as January?

A. Yes, sir, I have seen them at that time.

Q. And occur along in February other years?

A. Yes, sir.

Q. And they occur as late as May?

A. Well, I believe it was May I was shearing sheep up at Malheur City when I come and the flood was around there very close and the low land was all covered. I don't remember the year; I think 1884 or '85.

(Testimony of F. O'Neil.)

Q. But they occur more generally along in February? A. Yes, sir, February or January.

Q. When they do occur? A. Yes, sir.

Q. How long do they last on the ground—about how many days?

A. Well, do you mean how long it is the water runs in the creek? [241—185]

Q. No, how long does it overflow on the ground outside of the creek beds or channels?

A. I don't know much about the upper part of the creek. You see, I wasn't up there very much. My land is high. I am not on this low swampy land.

Q. Every year, however, Willow Creek practically, on its lower end, is practically dry every year—

A. I have seen it.

Q. You have seen it dry when they had floods, and have seen it years when it was dry—I mean along through the summer?

A. Oh, yes, sir. I understand now.

Q. The condition is just the same as it was two years, three years or several years ago—the conditions are the same during July and August?

A. I have seen water running down where I am this time of the year.

Q. That would be occasioned by the melting of snow up in the mountains, wouldn't it?

A. I think those months it was soaking out of the lowlands above me that helped it.

Q. You think it soaked out of the lowlands above you? A. That is what I always thought.

(Testimony of F. O'Neil.)

Q. Do you recall the location of the Eldorado Mining ditch?

A. Oh, I have heard something about it.

Mr. HUNTINGTON.—Objected to as incompetent, immaterial and not proper cross-examination.

Q. That is above you, isn't it? A. Yes, sir.

Q. You know it emptied a large volume of water into Willow [242—186] Creek for several years?

A. I have seen some used above Upper Willow Creek out of the ditch into Willow Creek. They used to mine there.

Q. That water, if not otherwise used, would flow down Willow Creek, wouldn't it?

A. It seems only a part of the way down Willow Creek.

Q. Then, it would sink into the gravel bottom?

A. Those ditches took it out above me generally. There are several ditches above me.

Q. What ditches are there above you?

A. Oh, I don't know. Cole's and Logan's and Kelly's—I don't know how many.

Q. There is a "Company" ditch up there—a ditch commonly known as the "Company" ditch or Farmer's ditch? A. Yes, sir.

Q. That has been in there for thirty years?

A. I don't understand what ditch that is.

United States Circuit Court of Appeals

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(IN FOUR VOLUMES.)

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Appellant,

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TION COMPANY (A CORPORATION),

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VOLUME II.

(Pages 241 to 544, Inclusive.)

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for the District of Oregon.**

(Testimony of F. O'Neil.)

Q. You have known Mr. Cole using water for how many years to your knowledge?

Mr. HUNTINGTON.—Objected to as incompetent, immaterial and not proper cross-examination and irrelevant.

A. Well, he was using water when I come in 1881 or 1882. Of course, I haven't been over the road every year since that and I couldn't tell anything about that.

Q. Do you know the location of the dam that is being built by the Willow River Land & Irrigation Company?

A. No, I don't know anything about that.

Q. You don't know the location of the dam that is being built [243—187] by the Willow River Land & Irrigation Company up in the gorge?

A. I know the gorge, but then I just used to come through a part of the gorge.

Q. You haven't seen it? A. No, sir.

Q. You know the purpose is to irrigate the same land during the summer season—the same land that Cole has been irrigating for several years?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and not proper cross-examination.

A. I don't know anything about it.

Witness excused. [244—188]

[**Testimony of Thomas W. Clagett, for Complainant
(Recalled).**]

THOMAS W. CLAGETT, recalled, a witness recalled on behalf of the complainant, having been heretofore sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. Referring to Section 9, Township 16 South, Range 43 East: Does the complainant company own the northwest quarter of that section?

A. They do.

Q. Do they own the northeast quarter?

A. No, sir.

Q. Do any of the channels of Willow Creek cross the northwest quarter?

A. The main channel of the creek is in the northeast quarter but it is entirely stopped with old beaver dams and consequently a large portion of the water just barely passes into the northeast corner of the northwest quarter.

Q. So that part of the water of Willow Creek, when there is sufficient, would flow into that quarter?

A. Yes, sir, when there is lots of water it spreads out and runs down that way; yes, sir.

Q. Is any part of that northwest quarter overflowed land?

A. Why, that is the piece I estimated there is ten acres as being in that corner that is overflowed.

Q. Since you have been connected with the company, or since you have resided in this locality, have you become familiar with the values of the land up and down Willow Creek?

(Testimony of Thomas W. Clagett.)

A. Why, only to the extent to which there has been any transfers of those lands made. That is the only criterion I know of by which prices on the creek are held. [245—189]

Q. Well, that makes the market value of the land as I understand it. Now, what would you say was the fair market value of these lands upon which crops can just be raised by being naturally overflowed, but have no water right so they can be irrigated throughout the season?

Mr. HART.—Objected to as incompetent and for the further reason witness has not shown himself qualified to answer.

A. I would say that the value of the lands which are subject to overflow would probably be between \$40.00 and \$50.00. I would say that \$40.00 was a conservative estimate of their value.

Q. Assuming now that those lands are deprived of the use of the overflow water during the spring months, what would such lands be worth?

A. If the water should be permanently taken from them, I think they would have no more value than sagebrush land which ordinarily isn't saleable.

Q. At what price, if there is any market price of the sagebrush land; the bench lands say, what would you say they are held at—unimproved lands?

A. Up to last year there was a great deal of the sagebrush land which was untaken and still remained untaken Government land, and it has no value until it has prospective value put into it through the possibility of water being put onto it. I do not think

(Testimony of Thomas W. Clagett.)

that sagebrush land which has no other outcome, or any future for it, can be valued at any more than a nominal value of from \$1.00 to \$2.50 per acre.

Q. How much less valuable would the lands of the Eastern [246—190] Oregon Land Company situated along Willow Creek, and which are riparian to that creek, be rendered if they were deprived for all time of the perennial overflow which covers portions of them and floods them?

Mr. HART.—Objected to as incompetent, and for the further reason witness has not shown himself qualified to answer, and ask that this objection apply to all these questions.

A. The value would largely be taken away. If there were no water upon this land from now on, and general conditions in the valley continued the same, the land would have no market value. If adjoining lands were to be improved and the country continued to advance those lands would have an added value simply as pasturage, but in no event would it be anything more than a nominal figure.

Q. You have examined the land, I think you stated, where the dam of the company is located, and in Section 27 and the land in Section 21, which is partially covered by the proposed reservoir of the defendant company. For what, if anything, would that land be valuable?

A. The land in Section 21 would only be valuable as it might contain mineral, and the land in Section 27 would only be valuable as it might be used as a reservoir for an irrigation system. Of course, the

(Testimony of Thomas W. Clagett.)

portions in the canyon have some value from the fact that the company owns the table land, the remaining portions of the section being upon the bench land and which affords some pasturage. If these sections were entirely deprived of stock water, of course, they would be somewhat depreciated in value. [247—191]

Q. Is that true with respect to the lands in the valley also?

A. Very much so, yes, sir. That is, as to the stock water I refer to.

Q. Do you know anything about the desert land filings which have been made by officers of the defendant company?

A. I have a plat of those filings but I don't believe I can give all of the filings from memory. I never tried to impress them upon my mind at all. I have not that plat here. Do you have it?

Q. I haven't the plat showing the locations or those desert land claims, but I have here a plat which shows a portion of the proposed line of canal, of what I suppose is the defendant company's proposed ditch. From that could you state what lands are covered by those filings?

A. I wouldn't be absolutely positive.

Q. Where is that plat?

A. It is in the office. I thought I gave it to you.

Q. Please step and get it. I wish you would state what lands are covered by those filings?

A. There are only a portion of these filings I know belong to the defendant company, or to officers or stockholders connected with the defendant com-

(Testimony of Thomas W. Clagett.)

pany. With others I am not sure about and will not give. The east half of the northwest quarter and the west half of the northeast quarter, and the east half of the southwest quarter, and the west half of the southeast quarter was filed on as a desert— (Section ?) Township 22 S., R. 15, 42 East, was filed on as desert claim by Dennis M. Brogan.

Q. Is that the Mr. Brogan who is one of the present owners of the defendant company? [248—192]

A. He is of the present defendant company.

Q. Go ahead and state the others.

A. The south half of the southeast quarter of Section 27, same township and range, was filed on by Margaret Brogan as a desert claim.

Q. Who is she?

A. I believe she is the wife of Mr. Dennis M. Brogan. The north half of Section 26 was filed on by Edward B. O'Donnell as a desert claim, and I understand he is connected with the defendant company. And the north half of Section 35 was filed on by Hugh O'Donnell as a desert claim, and I understand he is connected with the defendant company.

Mr. HART.—Objected to as hearsay—in the form of “I understand.”

WITNESS.—Well, unless a person had access to the books of the company he couldn't state except hearsay.

Mr. HART.—Objected to as hearsay.

Q. Do you concede he is one of the company? (To Mr. Hart.)

WITNESS.—I mentioned Edward B. O'Donnell

(Testimony of Thomas W. Clagett.)

but Hugh O'Donnell—

Mr. HUNTINGTON.—I would like it to go down that E. B. O'Donnell is an employee of the company.

WITNESS.—The others who took the other claims in this vicinity are connected with the defendant company.

Q. Were these claims all taken about the same time, if you know?

A. They were all taken last year.

Q. Now, what other desert claims have been taken in that [249—193] immediate vicinity and about the same time?

A. The claim of Margaret Brogan was taken in March of this year.

Q. What other claims—desert claims, were taken about the same time in that immediate vicinity?

Mr. HART.—Objected to as incompetent, irrelevant, immaterial, and also not the best evidence.

A. The east half of the east half of Section 22 and the west half of Section 27.

Q. Who filed on that?

A. It was filed on by Thomas A. Sutherland.

Mr. HART.—Who is Thomas A. Sutherland—do you know? A. I don't know.

Mr. HART.—Neither do I.

WITNESS.—The other filings are: The south half of Section 35 was filed on by John B. Barry at the same time, but I don't know him at all.

Q. These desert claims that you have mentioned, are they any of them near Willow Creek?

A. They lie in the vicinity within—the extreme

(Testimony of Thomas W. Clagett.)

southern point of the most southern of these claims would lie within three miles of Willow Creek.

Q. Do you know the nature of this country covered by these claims?

A. I have examined them.

Q. What is it?

A. It is bench land covered by sagebrush, fairly lying as a whole but having some rough land upon it.

Q. Do you know where the lands are which are now—which the [250—194] defendant company now claims to own at the Cole ranch?

A. I have never been over the entire tract to look at the lines. I think I am familiar with them to a—

Mr. HUNTINGTON.—We would like—is there any objection to my having Mr. Clagett getting certified copies of the deeds? As I understand it, he took those from the records just stating what has been conveyed to the company.

Mr. HART.—No, I have no objection to the descriptions of the land unless we desire to make any corrections.

Q. (Mr. HUNTINGTON.) Will you state, if you can, the description of the lands which have been conveyed to the defendant company?

A. I would have this to say in regard to the Cole land, I presume because the first agreement was really a conveyance—

Mr. HART.—Counsel just asked you to state the descriptions of the land that has been conveyed.

WITNESS.—I find that there was an error made in the Cole deed—

(Testimony of Thomas W. Clagett.)

Mr. HART.—Then give the description.

A. The land deeded by Emory Cole to the Willow River Land & Irrigation Company was the south half of the northwest quarter, and the southwest of the southeast—the description in the deed was: The south half of the northwest quarter, southwest quarter; then the southwest quarter of the southeast quarter of Section 19, Township 15 S, R. 43 East; the south half of the southeast quarter, and the south half and the southwest quarter of Section 16; the south half of the northwest quarter, and the north half of the southwest quarter, and the southeast of the southwest quarter, and west half of the southeast quarter, and southeast quarter of southeast quarter of Section 14. All of Section 23; northwest quarter of northeast quarter and southeast quarter of [251—195] Section 24. North half of southeast quarter; east half of the southwest quarter, and the northwest of the southwest quarter of Section 25, Township 15 S., R. 42 East. The deed states that there are 2360 acres contained, but by description it only covers 1800 acres. The land deeded by John F. Weaver to D. M. Brogan, and by him to the Willow River Land & Irrigation Company is the west half of the northeast quarter, the southeast of northeast and northeast of southeast of Section 30, Tp. 15 S., R. 43 East. The north half of northwest quarter, the southeast of northwest quarter, the east half of southwest quarter, the west half of southeast quarter, southeast of southeast of Section 30, same township and range. The south half of southwest

(Testimony of Thomas W. Clagett.)

quarter, west half of southeast quarter of Section 32, Tp. 15 S., R. 43 East, containing 640 acres. The south half of southeast quarter and southwest quarter of Section 36, Tp. 15 S., R. 42 East. The south half of the northwest quarter and the north half of the southeast quarter and the northeast quarter of Section 36, Tp. 15 S., R. 42 East. Then the northeast quarter of the southwest quarter of Section 24, Tp. 15 S., R. 42 East. The south half of the northwest quarter, the northwest of the northwest of Section 4, Tp. 16 S., R. 43 East. And the southeast of the southeast of Section 32, Tp. 15 S., R. 43 East. The southeast quarter of Section 4, Township 16 S., R. 43 East. The east half of the northeast quarter and the east half of the southeast quarter of Section 22, Tp. 15 S., R. 42 East. The west half of the southwest quarter and the southeast of the southwest quarter, and the southwest of the northwest of Section 24, Tp. 15 S., R. 42 East. I think that is all.

Q. Could you state from your own personal knowledge whether any of that land is under an irrigating ditch or constructed [252—196] prior to the purchase of the lands?

A. I know that all the bottom land, the land which is in meadow, was under irrigation ditch or ditches before the purchase of the land.

Q. What was the condition as to the balance of the land as to irrigation?

A. I only know concerning the bench land regarding the Emory Cole land. There was no irrigating ditch covering the bench land on his place prior

(Testimony of Thomas W. Clagett.)

to the purchase.

Q. How much of that bench land was there, approximately?

A. I always understood of the 2560 acres—

Mr. HART.—Objected to as hearsay.

WITNESS.—Well, I have been told by Mr. Cole himself.

Mr. HART.—Objected to statement of Mr. Cole as hearsay and incompetent.

WITNESS.—That he had 900 acres under water at the time he owned the land, which would leave 1600 of bench land unirrigated.

Q. What was that bench land—what grew upon it? A. Sagebrush.

Mr. HUNTINGTON.—I want to offer a certified copy of the patent, but the certified copy I have is attached to an affidavit, and if you will permit me, I will make the offer now and then obtain the certified copy subsequently?

Mr. HART.—That is all right.

Mr. HUNTINGTON.—The complainant offers in [253—197] evidence certified copy of patent from the United States to the Dalles Military Wagon Road Company covering the south half of the southwest quarter and the southwest quarter of the southeast quarter of section 21, containing 120 acres, and all of section 27, containing 640 acres. The certified copy being only of that portion of the patent which describes the above named lands, the patent itself containing a large amount of other lands which are not involved in this controversy, and which are

(Testimony of Thomas W. Clagett.)

omitted from the copy.

Mr. HART.—Now, we object to the introduction of your patent so far as it proves any title whatever in the present company. We have no objection to it that a patent was issued to the Dalles Military Road Company; we object to it insofar as it may claim to have title to this property: In other words, we do not admit the legality of it.

Mr. HUNTINGTON.—It is stipulated by counsel for both parties that whatever title was conveyed by the patent, the certified copy of which has just been offered, to the Dalles Military Road Company is now vested in the Eastern Oregon Land Company, the complainant, except as such title may have been divested or defeated as may be shown by the evidence in this case. It is not conceded by counsel for defendant that any title passed to the Dalles Military Road Company by the patent in question. [254—198]

At the hour of 5:00 o'clock P. M., July 22d, 1909, adjourned until 9:00 o'clock A. M. to-morrow.

At the hour of 9:00 o'clock A. M., July 23d, 1909, met pursuant to adjournment as above. Present: Same as before.

T. W. CLAGETT, recalled.

Cross-examination by Mr. HART.

Q. I wish you would give, Mr. Clagett, the location of the dam as you gave it the other day, and the reservoir?

A. I believe I said it was in the northwest corner.

Q. Give it to us as you gave it—from your notes.

(Testimony of Thomas W. Clagett.)

We simply want it straight.

A. It is in the northwest corner of the northwest quarter of the southwest quarter of the southwest quarter of Section 27, Township 14 South, Range 42 East.

Q. How long have you been out in Malheur County, Mr. Clagett?

A. I first came here in June, 1907.

Q. And you have since lived here?

A. Yes, sir. I have been away a month each year, but this has been my residence.

Q. And you are the resident agent of the complainant company? A. I am.

Q. And have held that position ever since you have been here? A. Yes, sir.

Q. You came here to assume that position?
[255—199]

A. I came here first in June and went back, and came back permanently in September.

Q. How long did you remain here in June, 1907?

A. I think about a week.

Q. So far as your personal knowledge is concerned, you have never seen any flood waters of Willow Creek? A. I never have.

Q. And this information you testified to about how high they were and what land was flooded was from hearsay?

A. I don't remember that I testified as to the height of the water; I testified as to the overflowed land.

Q. As to the overflowed land, and when, and how

(Testimony of Thomas W. Clagett.)

high, and which, of course, embraces the quantity of land overflowed, because it takes water that height to do it, the information you testified to all came from hearsay?

A. No, sir, I didn't testify about anything except as to the amount of the Eastern Oregon Land Company's land was overflowed and didn't testify as to when or to what extent.

Q. You didn't testify pertaining to flood seasons in this country?

A. I don't remember doing so.

Q. If you did it would be from hearsay?

A. It would be entirely from hearsay.

Q. You did, however, testify as to certain pieces of land in certain sections and locations that were overflowed? A. I did.

Q. You also testified that you made recently an examination of the banks of the stream from the lower part of the creek clear up to—

A. I testified beginning at Section 31, Tp. 15 S., R. 43 East, as to the banks of the stream on the land of the Eastern [256—200] Oregon Land Company and I will say now that such testimony was based on—

Q. You are not answering the question.

WITNESS.—I wish to finish this.

Mr. HUNTINGTON.—Let him finish his answer.

Mr. HART.—I will ask that all you have already said shall be stricken and go ahead and make your answer.

Mr. HUNTINGTON.—I shall insist that witness

(Testimony of Thomas W. Clagett.)

answers as he chooses.

Q. (Previous question read to witness—Line 27 to 29, pp. 200.)

A. It was based on written memorandum made at the time, until I reached Section 5, Township 17 S., R. 44 East. On that day I was ill and my place was taken by a helper, so the testimony as to sections 5, 9 and 15 was given from recollection only.

Mr. HUNTINGTON.—You say “memorandum”—from memorandum made by yourself?

WITNESS.—Yes, sir.

Q. 5, 9 and 15 in what township and range?

A. Township 17 S., R. 44 East.

Q. Did you examine the banks of Willow Creek at or in the vicinity of the dam that is located in Section 27 and 28, along in through there?

A. I have previously.

Q. Have you examined the banks of Willow Creek as it flows down from the dam to Cole’s place?

A. I have.

Q. Have you examined the banks of Willow Creek as it flows from Cole’s place on down to Section 5 in Township 17?

A. Not across the land of Mr. Cole.

Q. You didn’t examine that?

A. No, sir. [257—201]

Q. With the exception of the banks of Willow Creek across Cole’s land, have you examined it down to Section 5?

A. I wish to qualify; I have not examined the banks except on the lands of the Eastern Oregon Land Company.

(Testimony of Thomas W. Clagett.)

Q. Well, you went along the banks and observed them? A. Not entirely.

Q. From the vicinity of the dam site down to Section 5 you mentioned you did examine them—

A. I examined the banks on the—

Q. You can answer that.

A. I think I have answered it.

Q. Then, answer it again.

A. I have examined the banks of all the land on the stream from the dam to Mr. Cole's place. From Mr. Cole's place, or Section 31, I have only made special examination of the lands of the Eastern Oregon Land Company, through their private tracts. I know of that but I have not made special examination of—

Q. Now, you stated that certain lands along the banks of the creek were subject to overflow during the freshet season of water? A. I did.

Q. Did you get that information from hearsay—you can answer that "Yes" or "No."

A. No, sir.

Q. Did you get the information from seeing the lands overflowed? A. No, sir.

Q. The only source then that you had from which to come to that conclusion was by seeing drift wood of one kind or other or debris on the land?

A. Yes, sir, and also from the character of the vegetation [258—202] growing on the land.

Q. You could tell from the vegetation growing on the ground? A. Yes, sir.

Q. Did you see growing on the land—when did

(Testimony of Thomas W. Clagett.)

you make this examination?

A. The latter part of June, 1909.

Q. Did you see grasses, blue-stem and red-top and all these other kinds of grasses growing upon some of the lands at that time?

Q. I did; all the kinds that have been mentioned.

Q. Because you saw these grasses growing upon the land you concluded they had been flooded at one time or another? A. I did.

Q. And if there was no grass upon the land it showed there had been no flood?

A. That is true.

Q. Did you notice sagebrush upon the land?

A. I have.

Q. Was there sagebrush growing upon any of this land you saw grass growing upon?

A. I saw sagebrush on Section 15, Township 17 S., R. 44 East, but it was chiefly dead.

Q. Did you observe the spring water and springs that flowed into or arose upon Section 5, Tp. 16 S., R. 43 East?

A. I know of a spring on Section 5, Tp. 16 S., R. 43 East, but, as I recollect and I am very positive, it is not a flowing stream outside.

Q. You have seen that spring flow there during the month of June?

A. No, sir, during the summer it does not flow.

Q. It simply produces water enough to keep it in quite a hole [259—203] or puddle?

A. Yes, sir, it is quite a good spring.

Q. So far as you know there is no difference this

(Testimony of Thomas W. Clagett.)

year than for several years?

A. The spring is on the side of the road and I have passed it every year for three years, and I think it has been about the same for the three years.

Q. At other seasons of the year does the spring overflow its basin?

A. I have seen the road in the vicinity of the spring quite muddy from the overflow of the spring. I have never noticed that it crossed the road and penetrated the field.

Q. You mean to say by that then that you have seen it overflow its basin? A. I have.

Q. Can you say it never did overflow portions of the land? A. I cannot.

Q. Now the bank of Willow Creek from Cole's property on down this way at places it varies in height, doesn't it? A. Very much.

Q. Some few places it is low and other places it is rather high? A. Yes, sir.

Q. When the creek gets up because of the freshets higher than the banks at the low places, the substance of your statement is that it overflows the land immediately adjoining? A. Yes, sir.

Q. I think you testified pertaining to the topography of the ground in Section 31 and the channels of the stream?

A. Yes, sir, Township 15 S., R. 43 East.

Q. You stated that the channel at that place was 200 feet wide? [260—204]

A. Yes, sir, the old channel has been washed out to a width of 200 feet.

(Testimony of Thomas W. Clagett.)

Q. I don't care about the old, or the new, or any other except the channel of the creek as existing there at the time you saw it?

A. I would not say the channel outside is 200 feet wide because the old channel, or the channel which is 200 feet wide is only 12 feet deep, but since that channel was cut a new channel six feet deep was cut.

Q. Within that same space? A. Yes, sir.

Q. Did you see it cut? A. No, sir.

Q. Do you know when it was cut?

A. No, sir.

Q. It may have been existing there for thirty years? A. It may.

Q. Now the banks—the distance between those banks is about 200 feet, you would say?

A. I wish to qualify that last statement. The old channel is completely grown up with trees and brush and the new channel is not, so that I knew it was the old channel.

Q. How large are the trees?

A. The trees there are thirty or forty feet high.

Q. Then how many years do you think it would take the trees to grow thirty feet high?

A. I think it would take ten years to grow that high.

Q. You think they would grow that high in ten years?

A. Yes, sir, they having water that way.

Q. Then, this new channel you speak of is at least ten years old?

A. I don't think that that follows. [261—205]

(Testimony of Thomas W. Clagett.)

Q. You don't think that that follows?

A. No, sir.

Q. Well, at any rate, from bank to bank it is about 200 feet you say? A. I do.

Q. And that channel varies in depth to 25 feet at the greatest depth?

A. The greatest depth is 18 feet.

Q. From the bed of the creek?

A. From the bottom of the lowest bed to the top of the bank.

Q. That is 18 feet? A. Yes, sir.

Q. Did you measure that? A. I did not.

Q. You just guessed if off with your eyes and didn't measure it and you don't know?

A. I would state it is within a few feet of that.

Q. If it were run with levels and it ran 25 feet you would say that it ran "within a few feet"?

A. I would say I measured it by my own height on the bank so that I would say that the depth will not vary from 18 feet more than, at the most, two feet.

Q. Then, it might be 20 feet high according to your statement? A. It might be.

Q. You say you measured it from your own height. Do you mean to say you marked the size of your own height on the side of the bank and then climbed up and marked it again?

A. I stood in the bed of the new channel and that is exactly six feet high. Then by ascending to that height or onto the bend of the old channel I could

(Testimony of Thomas W. Clagett.)

tell very closely as to the height^h of the remaining bank. [262—206]

Q. Then you thought after you stood up on the next bank your height^h was about six feet below the top? A. Yes, sir.

Q. Was Mr. Johnson along there with you?

A. He was.

Q. Did he put the measurements upon that?

A. He estimated with his eyes.

Q. Just as you did? A. Yes, sir.

Q. That is the way the measurements were made?

A. On that piece it was.

Q. Did you measure the location of the dam site by your height^h in the same manner?

A. I did not.

Q. You knew that it was important to find out the height^h of these banks and you knew that you were coming here to testify? A. I did.

Q. The, why didn't you measure them so that you could testify truthfully as to the exact height^h?

A. I can testify as well from my eyes as I could from chaining it.

Q. You wish to say that you could get the distance with your eye as well as from any other measurement known either to you or Johnson?

A. No, sir, I didn't say that.

Q. Do you know the way you could have got the truth exactly as it is?

A. One could have used the level rod and got it exactly.

Q. You knew that at that time?

(Testimony of Thomas W. Clagett.)

A. I did. [263—207]

Q. And Johnson knew that at that time?

A. He did.

Q. You knew your evidence was to be used here in this case and still you never took the trouble to do that?

A. I didn't take the exact height to the inch.

Q. You knew that Mr. Johnson read off from his book as a surveyor when he testified and gave his testimony exactly the same as if it were taken by a surveyor when he was simply estimating or guessing about it?

A. I did not consider that it was guessing about it.

Q. He was estimating? A. Yes, sir.

Q. You saw him do that; you gave the exact figures and gave testimony as their exact height?

A. And I still assert the heights are correct.

Q. You still assert those are the exact heights and yet you told us you might have been two feet out of the way?

A. On that one measurement.

Q. Did you measure all these other places the same way?

A. The most of the other places I testified to they were measured all in the same way.

Q. The most of the other places you testified to were measured in the same way? A. Yes, sir.

Q. You made then no accurate measurements down there? A. Not with a level.

Mr. HUNTINGTON.—Are you speaking now of

(Testimony of Thomas W. Clagett.)

the depth measurements or all—

WITNESS.—Depth measurements altogether.

[264—208]

Q. You testified here as to various quantities of land that were overflowed at times. Did you run a chain and survey that land off as to each one of those pieces you testified about?

A. We used the chain and transit on all but the pieces on Section 9, Township 16 S., R. 43 East.

Q. Then how much land did you say there was in Section 9 that overflowed?

A. I said ten acres.

Q. As to that ten acres you simply made a guess?

A. I did. I have been estimating lands for twenty years.

Q. But you didn't ever measure flood lands up here before?

A. No, sir, I never measured flood lands up here before.

Q. Why didn't you measure that piece off with the same care as the other pieces in that?

A. Because I know from personal experience I can estimate a tract of ten or fifteen acres almost correctly. It wasn't necessary to measure it.

Q. Why didn't you estimate the others the same way? A. Because they were too large.

Q. As a matter of fact did you go around and measure those pieces of land with the transit?

A. Mr. Johnson did and I chained.

Q. Did you drive stakes?

A. We used pins.

(Testimony of Thomas W. Clagett.)

Q. And you went clear around the property?

A. Yes, sir.

Q. Was there any water on that land?

A. On part of it.

Q. You may have taken in parts that were not flooded?

A. In some of these tracts there would be natural small ridges. [265—209] They might vary from two or three feet to five or ten feet and of course we couldn't angle around those pieces and they were included.

Q. And you didn't take them out?

A. No, sir, we didn't take them out.

Q. And you just counted them in as submerged land?

A. They were included as submerged land.

Q. You included those as submerged land?

A. Yes, sir.

Q. And you testified here the other day that was all submerged land? A. I didn't so testify.

Q. Didn't you say so many acres of land were submerged? A. I did.

Q. From the various numbers of acres which you swore yesterday were submerged land you now admit a portion of them were not submerged?

A. I do.

Q. Why did you attempt to convey the impression, and leave it in your evidence, that all of the land was submerged when you knew it was not?

A. I didn't state all this land was submerged. I

(Testimony of Thomas W. Clagett.)

stated there were so many acres on each tract that were submerged.

Q. Now, I call your attention to Exhibit No. 4 of Plaintiff's proof. You had this in your hands yesterday when you were testifying, and you were looking at that exhibit and spoke about submerged land? Yes or No? A. I had.

Q. And you testified that was correct?

A. I believe I testified that there were 88.68 acres of submerged land on that section. [266—210]

Q. You testified that there were 88.68 acres of submerged land on that section? A. Yes, sir.

Q. And now you know there is not 88.68 acres of overflowed land and part is above?

A. I still know there is 88.68 acres of submerged land on that section.

Q. Will you swear that all of that is submerged land—that 88 acres?

A. I didn't refer to that particular 88 acres. I wish to explain this: On this tract which is marked on this plat there are several small ridges that are not ordinarily overflowed that are included in this line as shown on the plat.

Judge WEBSTER.—You are referring to that which is colored green?

WITNESS.—Yes, sir. There are submerged lands on this section which are not shown in this green line. There are necks that run from this main body which are submerged the same as this. It wasn't practicable to survey separately all those small necks, and that left more out of the land we

(Testimony of Thomas W. Clagett.)

meandered around than was included in the meander line of land that wasn't submerged.

Q. Then, from this explanation of yours, you impeach the correctness and truth of this Exhibit 4? The colors up there are not true?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, as stating a fact which is not true, and putting the—and attempting to put the witness in a position which is false, and to make his testimony [267—211] different from what the witness clearly intends it should be.

Q. Then you wish to say by your explanation that the place marked green, colored green on Exhibit 4, is not actually true as a correct representation of the ground at that place?

A. I will say there is possibly an acre of that ground as included within that green line which is not submerged ordinarily.

Q. And also the lines that run around the green, they are not correct there, are they?

A. As nearly correct as a meander line could run around them, the water not being on the ground.

Q. In other words you estimate them as being correct, and that is the reason—

A. According to our best judgment that is the overflow line.

Q. Then when you spoke of there being coules or ditches or ponds running up in addition to those that are colored green you really did not mean to say that these lines are correct?

A. I still adhere to what I said.

(Testimony of Thomas W. Clagett.)

Q. Instead of there being an acre of high land that is not submerged in Section 5 of this Exhibit 4 I will ask you if there is not nearer twenty acres of that? There are two whole knolls that is not overflowed at all and has sagebrush growing on it?

A. The entire land has been overflowed, but the ordinary season I didn't see over an acre or so that is not overflowed.

Q. Will you say there is not at least twenty acres of sagebrush on that section? [268—212]

A. I have not said there is no sagebrush on the land.

Q. How much sagebrush is there on the land?

A. I never measured it.

Q. Give me your best judgment.

A. I cannot answer, I never estimated it.

Q. Didn't you testify that all this 88 acres was grass land upon which sagebrush would not grow?

A. I didn't testify to that.

Q. Didn't you testify to that in general with all the other testimony you gave the other day?

A. I have not said there was no sagebrush on it; there is on some of it.

Q. On portions of the land which you have marked as overflowed land, and you have testified that it is meadow-land and valuable grass grew there, then you testify that sagebrush also grows there?

A. There may be some small portion of sagebrush but there is grass on all of it.

Q. I would say there is.

(Testimony of Thomas W. Clagett.)

Q. Have you got in your notes the amount of land that is not submerged and which is colored green? A. I have not in my notes, no, sir.

Q. Why didn't you put in the amount of the knolls that were on these pieces of property which you claim was submerged?

Q. Because they were too small to estimate.

Q. Will you say the knolls as a whole do not amount to more than ten acres on this Section 5 of Exhibit 4?

A. I will. I will add now a correction. That land includes the creek channel which is quite brushy there but—

Q. You have been saying that there were overflowed 88 acres and now we learn that part of the 88 acres which you stated [269—213] is overflowed is creek channel or bed?

A. It is all overflowed, but I wouldn't call the creek channel overflowed land.

Q. But you included the creek channel in the 88 acres? A. Yes, sir.

Q. And if you had not been cross-examined your statement would have conveyed the impression there were 88 acres in the land overflowed?

A. I still maintain there is more than 88 acres. Mr. Johnson, who ran the transit, was the one that laid out the lines; I did the chaining. He was the man in charge of the survey. In my estimation there was more land overflowed than what he included, and I can conscientiously swear that, while some of the land shown in the green lines is not ordinarily sub-

(Testimony of Thomas W. Clagett.)

merged, there is still more submerged land, from the fact there is land overflowed that is not within the lines which he ran.

Q. Then you wish to say the land shown as overflowed in the green lines at times there is too much and sometimes too little?

A. The land within the green line is overflowed land.

Q. All of it?

A. With the exception of these small ridges I have spoken of.

Q. It is all overflowed land with that exception?

A. Yes, sir.

Q. And the creek-bed?

A. And what is in the creek channel on these particular tracts. And, in any of the tracts where the overflowed land lay on both sides of the creek we, of course, included by taking our measurements across the creek and included the creek channel in our measurements. [270—214]

Q. But you never made that statement the other day when he testified the other day, did you?

Mr. HUNTINGTON.—He volunteered it to-day.

Q. You never made that statement the other day?

A. I testified to the amount of the land, of overflowed land on each side of that tract.

Q. You never made that statement the other day—yes or no?

Mr. HUNTINGTON.—Counsel for complainant objects to the method of cross-examination for the reason that this witness upon cross-examination was

(Testimony of Thomas W. Clagett.)

not asked as to the correctness of those plats but was interrogated as to the amount of overflowed lands upon these several tracts. Mr. Johnson, while upon the stand, was asked whether those plats represented the overflowed lands as he surveyed them, and the plats were introduced when Mr. Johnson was on the stand.

Q. Then you want the question asked again because you do not recall what statement it was you made? A. No, sir, that is not the reason.

Q. Then answer, if you do recall?

A. I started to answer but you interrupted me. The question as I recollect it was as to the other day when I testified I made any mention of these lands included in the green lines which were not overflowed. I now say I did not because that phase was never brought out or asked for.

Q. You never told us that a part of the 88 acres, referring [271—215] specifically to Exhibit 4, which you claim was overflowed, and which are shown by green marks on Exhibit 4—you never claimed or explained that a part of it was the creek-bed, did you? A. I did not.

Q. You knew at the time you were testifying that, if you were not cross-examined on that exhibit that your evidence would convey an entirely different impression to the person reading it?

A. I did not.

Q. You did not? Now, Mr. Johnson when he testified (you heard him here) he said that Exhibit 4, the green line, represented the amount of land

(Testimony of Thomas W. Clagett.)

overflowed? A. I believe he did.

Q. And that it was 88 acres of overflowed land within the green line on Exhibit 4?

A. I believe he so testified.

Q. And now you wish to say he was mistaken in that there are parts of it that are ridges which are not overflowed and part of it is creek-bed?

A. I presume that in making the statement he did not consider or take into consideration the creek-bed.

Q. He also forgot to take out of it the land that was not overflowed, and which he had marked overflowed, didn't he?

A. I believe there was no mention made of it.

Q. Now, did he make similar mistakes in locating that dam on Sections 27 and 28?

A. He did that correctly.

Q. What he swore there is true?

A. It is the truth.

Q. Irrespective of what he may have sworn to in his evidence? [272—216] A. It is.

Q. In Exhibit No. 5, being Section 23, Township 16 S., R. 43, you have in that exhibit—you testified that in that section (after looking at this exhibit as handed you by Mr. Huntington, your counsel) you testified that there was 45.6 acres overflowed, didn't you? A. I did.

Q. Yes, sir. Now, there are parts of that 45.6 acres that is not overflowed land, isn't there?

A. No, sir.

Q. Do you wish to say that is all overflowed land?

A. I do.

(Testimony of Thomas W. Clagett.)

Q. All overflowed and bottom grass land you were talking about?

A. The creek channel traverses that land the same as the other.

Q. The creek channel is still a part of the 45 acres? A. It is.

Q. You would not call the creek channel meadowland? A. I do not.

Q. And yet you said this 45 acres was meadowland worth \$45.00 per acre?

A. It was never figured on putting the price on it.

Q. But the creek channel was figured out as part of the overflowed land?

A. If the land overflowed were to be figured to a fraction of an inch or a foot the creek channel, of course, would not be included.

Q. Didn't you have to figure to a fraction when you figured out 45.61 acres?

A. Those figures undoubtedly were drawn from—

Q. I am not asking you that question— [273—217]

A. The figures undoubtedly were made from the measurements taken and probably when they were figured they resulted in the fractions and so were set out.

Q. (Previous question read to witness—Didn't you have to figure to a fraction when you figured out 45.61 acres?) Answer yes or no. A. Yes, sir.

Q. Then, when it was figured out to the inches and feet in the shape of 45.61 acres it included the creek-bed? A. I didn't do the figuring.

(Testimony of Thomas W. Clagett.)

Q. You testified to the same figures—the same amount? A. I did.

Q. And your testimony included the creek-bed as part of the overflowed land? A. Yes, sir.

Q. Do you count the bed of the creek as part of the overflowed land when describing overflowed lands? A. Not strictly.

Q. Your evidence then would convey the impression of untruthfulness or correctness?

A. It would convey the impression that it wasn't considered.

Q. It would convey the impression that there was 45.61 acres in this Exhibit 5 which was overflowed land when in truth there is not that much overflowed land?

A. I still maintain that there is on each one of those pieces the amount of overflowed land. We did not, or at least I did not claim that line as shown there is absolutely correct as it would be drawn by angles.

Q. You had a surveyor there drawing, did you?

A. Yes, sir.

Q. (Previous question read to witness—It would convey the [274—218] impression that there was 45.61 acres in this Exhibit 5 which was overflowed land when in truth there is not that much overflowed land?) A. Well, I presume it does.

Q. Now, instead of one creek in this Section 23 as shown on Exhibit 5 there is more than one creek-bed?

A. There are several small channels on it.

(Testimony of Thomas W. Clagett.)

Q. There are several small channels on it. How many small channels are there?

A. Why, two that I distinctly remember of.

Q. On the submerged land?

A. That were included within the meander line.

Q. There were two creek channels that were included within the meander line?

A. Two small creek channels.

Q. How many more are there in addition to the two which you have?

A. There are none that I know of.

Q. Will you say there are none?

A. There is a small hole there on the meadow-land which has been gophered out by water—as the work of water.

Q. That small hole is just like the other creek channels? A. Yes, sir.

Q. Then, instead of two you have now told us of three. Now, how many more?

A. I might say in measuring this level meadow-land—

Q. How many more channels are there?

A. None that I know of.

Q. You have told us of three. You made minutes or took notes or memorandum of the land at the time you were on Section 23? A. I did.

[275—219]

Q. And you also said your memorandum as made there showed the true condition of the land on Section 23? A. I did; yes, sir.

Q. And that is also true of the land in Section 5,

(Testimony of Thomas W. Clagett.)

Exhibit 4, pertaining to your memorandum?

A. According to what I testified.

Q. Sir?

A. My memorandum covers what I testified to.

Q. You don't mean to say you made a memorandum of only those things that were good for you and left out things that were not? A. I do not.

Q. Then, you made a memorandum of everything? A. I did so as nearly as I could.

Q. Let me see your memorandum.

A. This is not the original.

Q. Where is the original?

A. In my office.

Q. Is it a copy of that?

A. It is partially.

Q. How long will it take you to go and get it?

A. Just a few minutes.

Q. I will ask you to go and get it and return at once. And I will ask you not to examine it or permit it to be examined, as you are under examination.

(Witness retired and returned in a few minutes producing the original memorandum.)

Q. Is this book which you now have the original memorandum? A. It is.

Q. And it is the one that was made by you on the ground? A. It is. [276—220]

Q. I wish you would turn to the memorandum that pertains to Section 5, which is Exhibit 4, for me.

(Witness does so.)

Q. Now, asking you a question, for a moment re-

(Testimony of Thomas W. Clagett.)

turning to Exhibit 4 and the memorandum plat that you have drawn on Exhibit 4—that you have drawn in your memorandum-book, I call your attention to several lines, one, two, three, four, running from the northwest corner catacornered to the southeast corner of the little plat as drawn in your memorandum-book, do those represent channels of the creek?

A. No, sir.

Q. What are they?

A. They represent contour lines of the hill drawn in at random.

Q. Contour lines? A. Yes, sir.

Q. The difference between each line represents how many feet?

A. It is not intended they should represent any feet there at all on that memorandum-book. I wasn't estimating the hill. I just drew that in to approximately locate the hill.

Q. Then, those marks simply represent the hill?

A. They simply represent the hill.

Q. Now, did you make on this little plat the ridges—anything to represent the ridges or the portion which is not overflowed? A. I did not.

Q. That was a memorandum that you didn't keep track of?

A. This was a memorandum—well, yes, sir, that is true, I didn't keep track of it. But I will say this was a memorandum as far as the plat is concerned to show the location of the creek channel and nothing more.

Q. Then, it simply shows nothing more than the

(Testimony of Thomas W. Clagett.)

creek channel? [277—221]

A. That is my memorandum.

Q. Is that true of all the memorandums as made?

A. Yes, sir, that is the locations and the depths and measurements of the channel.

Q. The locations and the depths and measurements of the creek channel?

A. Yes, sir, and was especially designed to indicate those facts.

Q. Have you got a book memorandum showing the amount of land that is not overflowed and which is embraced as overflowed in the green on these various Exhibits from 3 to 7? A. I have not.

Q. You knew that was an important thing to find out the correct amount which was not overflowed that you would represent as overflowed?

A. My instructions were to show—to have the overflowed lands measured and that was what we designed to do.

Q. Who did you get your instructions from?

A. From the office—from my principals.

Q. Did they instruct you to include as overflowed lands parts and parcels of land which are not overflowed? A. They did not.

Q. Then you and the surveyor, Johnson, fixed that up yourselves?

A. We surveyed the land to the best of our judgment.

Q. And included the high places?

A. We included those because it was impossible to eliminate them.

(Testimony of Thomas W. Clagett.)

Q. And never spoke of it until it was brought out in your cross-examination?

A. I did not; but it was not designedly.

Q. Now, this creek as it flows through Section 5 as shown on [278—222] Exhibit 4, how wide is the creek channels, all the channels together?

A. I only know of one.

Q. How wide is it?

A. The channel is 80 feet on top and 16 feet on the bottom and 12 feet deep?

Q. Eighty feet wide on top, 16 feet on the bottom and 12 feet deep? A. Yes, sir.

Q. In other words, the water at this place must rise more than 12 feet before it can overflow on any of what you have classed as overflowed lands?

A. Yes, sir.

Mr. HUNTINGTON.—You mean from the bottom of the channel?

Mr. HART.—Yes, sir, it must rise 12 feet.

Q. You spoke of the width of the channel in Section 31; I refer to the channel which you spoke of as being a new channel, and the trees growing where the old channel was, do you recall your evidence?

A. I do.

Q. What made that deeper channel which you designated in those questions the new channel?

A. It would be what it cut of later years?

A. Cut by what?

A. By the flow of water.

Q. How deep is that at that place, the channel where the flow of water cut it out deeper?

(Testimony of Thomas W. Clagett.)

A. The new channel is six feet below the bed of the old channel [279—223]

Q. How wide is it?

A. I can only state from recollection, but I would say it was about 12 feet wide.

Q. And about how long?

A. I did not traverse the entire length of the channel across the entire section.

Q. Give me your best remembrance of it—about how long. We will take that as an approximation.

A. I only saw the channel on the north and east lines. I testified on the north channel was 200 feet wide and 18 feet deep.

Q. No, you are answering relative to something else. I want to know how long that new channel, which you said was six feet deep and 12 feet wide, that portion of it—it is a part of the whole channel. I want to know how long that was?

A. I presume it extends across the entire Section 31. I only saw it on the north side and east side of the section. The channel was 18 feet deep and that was all I testified, except that I testified on the north side there was a new channel cut six feet below the bed of the old channel.

Q. I don't know whether you misunderstood me or not, but I will try to ask the question again so there will be no confusion in your answer. I refer to that new channel only which you said was 6 feet deep and 12 feet wide in Section 31. Do you understand? A. Yes, sir.

Q. I asked you how long that new channed was,

(Testimony of Thomas W. Claggett.)

not the channel of the creek, but that new channel six feet deep and 12 feet wide—how long that is?

A. I don't know.

Q. Can you give me an approximation or estimate from what you [280—224] saw of the length of it?

A. I cannot.

Q. Well, it wasn't simply one hole, was it?

A. I crossed it on the north line, so far as I can say it extends—but I could only see down the bank probably a hundred feet.

Q. Did you see the same condition at the other end of the section?

A. I did not.

Q. But you could see down the bank and see this channel a hundred feet, so far as you could see?

A. Yes, sir.

Q. And you don't know how much farther it extends?

A. I do not.

Q. And you stated that was washed out by the water?

A. I did.

Q. It must have been a violent current or torrent of water to wash out that distance?

A. A volume of water that would come through a cut 200 feet wide would easily wash it out.

Q. A volume of water?

A. A volume of water coming through a cut 200 feet wide it would, a channel six feet deep.

Q. What do you mean by a volume of water?

A. I mean this flood water that comes down Willow Creek.

Q. You mean if the whole channel was full 200 feet wide it would wash out this new channel?

(Testimony of Thomas W. Clagett.)

A. I do.

Q. Then it must come with tremendous force to do that? A. It did wash it out.

Q. It would take a current of how many miles an hour to [281—225] wash that out?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

A. I don't know.

Q. It would have to come with the force of a torrent to do it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

A. I don't know; I don't think so.

Q. In your experience?

A. I don't know; I don't think so.

Q. You don't think it would need a torrent to do that?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

Q. It would take a good, stiff current to do it?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and not proper cross-examination.

A. Yes, sir.

Q. That channel would have to be practically full in order to make a current with volume and force enough to wash it?

Mr. HUNTINGTON.—Objected to as not proper

(Testimony of Thomas W. Clagett.)

cross-examination, incompetent, irrelevant and immaterial. [282—226]

A. I don't think so.

Q. Was there any marks on the side of the channel to show how far the water had gone out—I am speaking of the channel in Section 31?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

A. I don't know.

Q. Has it ever done it?

A. I didn't see any.

Q. Will you say there is not any drift wood or brush to show it had overflowed?

A. I will not.

Q. Now, in Exhibit No. 6, Section 25, Township 16 S., R., you testified there was 41 acres of land overflowed there? A. I did

Q. Referring to Exhibit No. 6, you testified in Section 25, Township 16 S., R. 43 East, there was 41 acres of overflowed land? A. Yes, sir.

Q. How much land of that is knoll and is not overflowed?

A. There is a knoll which crossed that land and the land was measured in two separate lands on each side of the knoll.

Q. It was measured on both sides of the knoll?

A. Yes, sir.

Q. And in this way your 41 acres was made up there?

A. It was made from the measurements of the

(Testimony of Thomas W. Clagett.)

two separate lands; yes, sir.

Q. Then you deducted the knoll in this case?

A. It was not included in the 41 acres. [283—
227]

Q. You knew it would be wrong to include the knoll in this instance?

A. We didn't aim to include any knolls, and that knoll may not be shown on that plat there.

Q. But you didn't tell us that in your direct examination, did you?

A. My understanding of these plats are, that they represent the amount of overflowed land, taken from actual measurements, but we didn't pretend to set off on the plats, as I understand, these little knolls which might have been measured, but in this case were not measured. That knoll was not measured and it is not shown on that plat and is not included in the computation.

Q. (Previous question read to the witness—You knew it would be wrong to include the knoll in this instance and you did not tell us that in your direct examination, did you?)

A. I testified to the amount of the overflowed land and nothing else, to the best of my knowledge.

Q. Mr. Johnson didn't tell anything of that point in his examination there, did he?

A. I believe it wasn't brought out.

Q. It wasn't brought out and he didn't tell it?

A. He didn't tell it.

Q. In this last explanation of yours did you figure the pieces of creek in your 41 acres as part of the

(Testimony of Thomas W. Clagett.)

overflowed land?

A. The two small channels which were crossed were included in the measurement.

Q. You did then figure as a part of your 41 acres the bed of the creek? A. We did. [284—228]

Q. This green on these maps represent the overflowed land, don't it?

A. It represents the extent of the overflowed land.

Q. That was what it was put there for, to convey to the mind that it was overflowed?

A. To convey to the mind that particular section was overflowed.

Q. And that dry land is not included in it, is it?

A. It is not.

Q. But the knoll of dry land is not shown in it, is it?

A. It was not. It was not intended it should be shown. These plats are to mark the location of the overflowed land and it is not intended that they are absolutely accurate to the foot. The blue line, if you will notice, the blue line there is put on in a general way. The lines as run with the instrument were run by angles and chained and the angles taken at every chain. The computation is made from those figures, but the line as put on the plat is a general one designed to locate on the section the location of the overflowed land. The angles as taken and chained are not shown upon those plats.

Q. I will ask that his explanation be stricken, because it does not explain anything, and for the

(Testimony of Thomas W. Clagett.)

further reason it is unintelligible.

Q. This green was placed on this plat to convey to the mind that all of the land colored green was overflowed land, wasn't it? A. It was not.

Q. What was it put there for?

Mr. HUNTINGTON.—Objected to as we think it has been answered. [295—229]

A. It was put there to locate upon the section the overflowed land.

Q. This doesn't represent then the truth as to the condition of the land that is included within the lines of the piece marked green, does it? That is not the truth, is it?

A. It doesn't designate it exactly—or we didn't pretend accurately to designate the exact line of the overflowed land.

Q. This doesn't represent the truth as to the condition of the land that is included within the lines of the piece marked green, does it? (Read to witness.) Now, if that is the truth say "Yes" and if it is not say "No."

A. I have stated that the green line does not designate the overflowed land by angles, and, consequently, is not exact as shown on the plat.

Q. Well, does the green as shown on this Exhibit represent overflowed land? A. It does.

Q. It was put there to represent overflowed land?

A. It was.

Q. Now, you are sure of that? You don't want to explain that again, do you?

A. I still maintain that that was placed there to locate relatively the amount of the overflowed land

(Testimony of Thomas W. Clagett.)

and the location on the section of the land of that section which is overflowed.

Q. And a part of the land that is embraced within the green on this section is not overflowed?

A. It is not.

Q. Then this exhibit does not speak the truth?

A. It depends upon what is claimed for it. [286—
230]

Q. What did you claim—that it was the truth?

Mr. HUNTINGTON.—Objected to for the reason the witness did not put it in and the witness did not prepare it, and the witness has never testified that the exterior lines of the green portion of the plat accurately represented the overflowed land.

Q. You knew then when this was introduced in evidence that it did not represent the truth?

A. I did not.

Q. And, in order to show the high land—in order to speak the truth the high land must be shown upon it?

A. If it was figured to the minute fraction it would have to be shown.

Q. When you state that it contains 41 acres that describes the overflowed land? A. It does.

Q. You knew that to speak the truth it must show the high land? A. The plat—

Q. Answer the question.

A. I am going to answer it. As I understand the purpose of the plat it speaks the truth.

Q. And still it doesn't show the high land, does it? A. It doesn't show the high land.

(Testimony of Thomas W. Clagett.)

Q. And there is high land in that place you have marked green?

A. In that section and on Section 5—

Q. Of that 41 acres you have within those marks I will ask you if there is not fully fifteen acres that is not overflowed at all, and that you have put there on this plat Exhibit 6—if there is not fifteen acres that is not overflowed at all? [287—231]

A. We did not measure the land in the knoll which I have alluded to. I don't know the acreage of it.

Q. (Previous question read to witness—Of that 41 acres you have within those marks, I will ask you if there is not fully fifteen acres that is not overflowed at all and that you have put there on this plat, Exhibit 6—if there is not 15 acres that is not overflowed at all?)

A. I took no note of the amount or extent of the knoll which is included in the plat. I don't know whether it is 15 acres more or less.

Q. You saw this knoll, didn't you?

A. I did.

Q. You explained to us awhile ago what a good eye and judgment you had in measuring land with your eye? A. I did.

Q. And you told us you could pick out a piece of land and say that is ten acres and wouldn't miss?

A. Relatively correctly.

Q. Just tell us if that green piece of land that is not overflowed and that is located in Section 25, Township 16, within the line you have marked green

(Testimony of Thomas W. Clagett.)

on Exhibit 6, tell me if that piece of land is not more, according to that eye and judgment of yours, more than 15 acres?

A. That piece of land lies much longer than it is wide. I paid no attention to the knoll because it was of no concern to me. We were measuring overflowed land and that wasn't overflowed land and no attention was paid to it. I don't know the extent of the land in that knoll.

Q. I will ask you to read the question, and I will ask the witness to tell us according to your judgment and experience you have if there is not more than fifteen acres in that [288—232] dry knoll?

A. I don't know how much there is; I don't think there is 15 acres.

Q. You don't think there is 15 acres?

A. No, sir, I don't.

Q. How many acres do you think it amounts to?

A. I don't know; I never paid any attention to it.

Q. What is the width of the channel of Willow Creek, or what is the height of the channel—the bank of the stream of Willow Creek as it flows through the land set forth in Exhibit 6, Section 25, Township 16 S., R. 43 East?

A. I have a note here: One channel 25 feet on top, 3 feet on the bottom and four and a half feet deep. Main channel 26 feet wide on top, 8 feet on bottom, 9 feet deep.

Q. The water then—did you follow the channel which you speak of being four and a half feet deep—did you follow that channel to where it connected with the main channel of the creek?

(Testimony of Thomas W. Clagett.)

A. I did not.

Q. You don't know how high above the bottom of the main channel was the bottom of this channel which you speak of as being four and a half feet deep?

A. I don't know.

Q. The water in Willow Creek proper before it could overflow onto this land would have to rise at least how far or be how deep?

A. The main channel, I believe, is nine feet deep I stated, and it would have to rise nine feet to overflow.

Q. Did you make a measurement of that, or just guess, or is it an estimation?

A. The measurement of the width was taken by chaining; as to the [229—233] depth, it was estimated.

Q. Is the top of the channel which you speak of as being four and one-half feet in height—in depth—is the bank or top of that channel on a level with the bank of the main channel which you said is nine feet in depth?

A. I would say there was very little difference.

Q. The fact is then it would make no difference which channel it came the water in the creek would have to rise at least nine feet or more before it would overflow any of that land?

A. I would say so.

Q. Now, how many more channels of the creek are there that run through Section 25, and on that part marked green as overflowed land?

A. There are two small channels.

(Testimony of Thomas W. Clagett.)

Q. Two. You have given us the width and depth of one of them, give us the width and depth of the other—this is Exhibit 6, Section 25, Township 16.

A. The memorandum which I have here is: One channel four feet wide, three feet deep. The main channel, I have already given that. The third channel which was not previously given; three feet deep by five feet wide.

Q. Now, I will call your attention to the land in Section 13, Township 16 S., R. 43 East, as shown on Exhibit No. 7. You stated or testified the other day there was 36 acres of land overflowed there?

A. I did.

Q. In your testimony when you were stating that you had this exhibit in your hand and read from it?

A. I did not have.

Q. You didn't have this in your hands?

A. No, sir. [290—234]

Q. Didn't you have these in your hand when being examined in direct examination the other day?

A. I had them in my hand but I took the figures from my memorandum book.

Q. You did have them in your hand and examined them? A. I did; yes, sir.

Q. You did testify that they were correct the other day, didn't you, when you had them in your hand and examined them? A. I did not.

Q. There was another question I desired to ask you pertaining to Exhibit 6, Section 25, Township 16 S., R. 43 East. Isn't it true that sagebrush and grease wood is growing all over the piece of property

(Testimony of Thomas W. Clagett.)

which you have marked on this exhibit as overflowed land?

A. There is considerable sagebrush on that land.

Q. There is sagebrush on it? A. Yes, sir.

Q. When you testified the other day that you knew overflowed land because when it was subject to overflow it kills off the sagebrush and there was no sagebrush on it, that didn't apply to those pieces of property? A. I did not so testify.

Q. Didn't you testify to that effect?

A. No, sir, Mr. Johnson so testified.

Q. Then, when Johnson testified to that it wasn't true, was it, as applicable to these pieces of land?

A. I think not, though he stated "when water stood on it for any length of time."

Q. Do you mean that the overflow kills it only in twenty years or stands overflowed—

A. The character of the land anywhere it is overflowed, unless [291—235] it is high land in the valley.

Q. But you do find sagebrush and greasewood all over it?

A. It has, scattering over the tract.

Q. It is just as thick over that as it is on the side-hill? A. No, sir, it is not so thick.

Q. Practically so?

A. No, I would not say that.

Q. But you could find plenty of places up through the valley where it is thicker?

A. The larger part of that is mowed land, and if it were covered with sagebrush it couldn't be mowed.

(Testimony of Thomas W. Clagett.)

And hay is put up on it every year, I am told, except on the knoll.

Q. How many acres are there in the knoll?

A. I don't know, but I would say of the overflowed land that is mowed there might be 15 or 20 acres.

Q. Then there is 15 or 20 acres in reality that is overflowed?

A. There is grass on all this 41 acres, which shows it is overflowed land.

Q. Because it has grass on it?

A. The character of the vegetation shows that.

Q. Who told you that?

A. I know that from experience.

Q. You have never seen any overflowed land here, with water on it? A. No, sir.

Q. Then, there is overflowed land of fully—so that it can be mowed—15 acres?

A. I think that would probably cover it; yes, sir.

Q. How much now in Section 13, Exhibit 7—you testified the other day there was 36 acres of overflowed land there? A. I did. [292—236]

Q. Mr. Johnson testified to the same?

A. I believe he did; yes, sir.

Q. And you located that—that is located where that overflowed land is in Section 13, Exhibit 7, as shown by the green on Exhibit 7?

A. The line around that was run by angles; the green line there is only placed on to indicate the general location.

Q. I didn't ask you anything about angles. Read

(Testimony of Thomas W. Clagett.)

the question to him. (Previous question read to the witness.)

A. It is designed to indicate the overflowed land.

Q. The green is put there for that purpose?

A. Yes, sir.

Q. Now, tell me how many knolls are there within that area—the west half of the southwest quarter? How many knolls are there that are not overflowed at all?

A. I don't recall of any. I think nearly all of that land is mowed land.

Q. Will you say there are no knolls on that that is not overflowed?

A. I will not say so; there may be small knolls.

Q. How much of that is covered with sagebrush?

A. There is no sagebrush on it that I recall.

Q. Will you say there is no sagebrush on it?

A. To the best of my recollection there is no sagebrush there.

Q. Now, in Section 5, Township 17 S., R. 44 East, as shown on Exhibit 8. You do not make any claim for any overflowed land in that at all?

A. No, sir.

Q. That is all land that is not capable of being irrigated?

A. Not by overflowing from the creek channel.
[293—237]

Q. Now, in Section 9, Township 17 S., R. 44 East, as shown on Exhibit 9, you do not claim any overflowed land there at all?

A. We do not; no, sir.

(Testimony of Thomas W. Clagett.)

Q. In Section 15 as shown on Exhibit 10 you testified there were 80.74 acres that were overflowed, didn't you? A. 80.74 acres.

Q. That is figured down to the feet and inches you speak about? A. Yes, sir.

Q. And you have seen this Exhibit No. 10 at numerous times— It has been in your keeping before the commencement of this trial?

A. No, it was not.

Q. You have seen it? A. Yes, sir.

Q. You know it was offered here in evidence?

A. I do.

Q. And the part marked green on the map is for the purpose of indicating the land that is overflowed? A. It is.

Q. Now, tell me how much of that is ridges that is not overflowed at all within the area marked green? A. I cannot tell you.

Q. Give me your best judgment?

A. The land there is supposed to be the overflowed land.

Q. I am not asking you of the "supposed," I ask you to please tell me the number of ridges or knolls that is within the area indicated by the coloring green on this map, the acreage?

A. I cannot give it, as I stated.

Q. Then give me the number of knolls or ridges without regard [294—238] to the acres?

A. I cannot give the number.

Q. How many do you think there are?

A. Why, I would think there were possibly three

(Testimony of Thomas W. Clagett.)

or four narrow ridges running through the land.

Q. They are covered with sagebrush?

A. There is sagebrush on that land.

Q. And there is sagebrush all over in various portions all over outside of the ridges?

A. Yes, sir, and most of it is dead.

Q. How did you run the mower over that?

A. It has never been mowed; no hay was ever put up on that piece.

Q. No hay was ever put up on that piece?

A. No, sir.

Q. Now, I presume in these 80.74 acres as overflowed land you have also figured in the creek beds and channels, all of it is overflowed land?

A. The overflowed land lies on both sides of the channels of the creek and they were not taken out of the measurement as we measured the land, so they would be included.

Q. Then they are included?

A. They are included; yes, sir.

Q. And there are also figured in as shown by the green on this map the various ridges and knolls which you remembered are four?

A. I think I said three. They are figured in that green.

Q. Can you give me an approximation of the number of acres of the land included in these four ridges or knolls?

A. It would be a guess upon my part. There might be anywhere from one to three acres. [295—

(Testimony of Thomas W. Clagett.)

Q. You think from one to three acres?

A. Yes, sir.

Q. You didn't make any plat of the number on Section 25?

A. We claim no overflowed land on twenty-five; no, sir.

Q. Now, in your evidence—

A. We claim it is riparian but we do not claim it is overflowed land.

Q. You made no claim as to overflow?

A. No, sir.

Q. Did you make any claim as to whether any of it could be irrigated by damming up the creek?

A. I stated it could not be.

Q. You stated about several of these pieces of property the irrigated land could be increased by damming up the creek? A. I did.

Q. Did you testify as to any overflowed land in Section 23, Township 17 S., R. 44 East?

A. I don't remember whether that section was asked about or not.

Q. Didn't you testify—I refer to Section 23, Township 17 South, Range 44 East, a piece of property that has no map pertaining to it, do you recall testifying pertaining to that?

A. I do now; yes, sir.

Q. Did you say there was any land on that section that was overflowed? A. I did.

Q. That is one section that you did not make minutes of yourself?

A. Yes, sir; there was never any measurement

(Testimony of Thomas W. Clagett.)

made of that section at this time.

Q. You didn't make any measurement of that section? A. No, sir. [296—240]

Q. Did you ever make any measurement of that section?

A. I did not but our company had it measured.

Q. Were you present when it was measured?

A. I was not.

Q. Then, this measurement you testify to was simply hearsay, or what somebody told you?

A. It was according to our map, which was made for us at a former time.

Q. It was not made with reference to this suit?

A. No, sir, and I have no personal knowledge of the survey.

Q. Nor of the condition of it?

A. I have of the condition of it; I have been entirely over it.

Q. Insofar as the witness' testimony pertaining to this Section 23, Township 17 S., R. 44 East, which he testifies to some data furnished by someone else, I will ask that it be STRICKEN OUT AS INCOMPETENT, IRRELEVANT AND IMMATERIAL.

Q. Sagebrush grows on Section 23?

A. On some of it.

Q. It is all out up by high knolls and ridges?

A. The meadow-land is not.

Q. I am not talking about meadow-land—the section is?

A. The bench land is; yes, sir. The bench land is cut up by high knolls and benches on it.

(Testimony of Thomas W. Clagett.)

Q. And the amount of overflowed land, from measurement made by yourself, if any, you don't know the amount?

A. Only as I would estimate it from going over it. I never have measured it.

Q. You never measured it?

A. Only to this extent. I have measured the east line of the section and the north line in connection with a former suit we had. [297—241]

Q. But as to the amount of overflowed land you never measured or chained that?

A. Not around the entire piece; no, sir.

Q. And your estimate as to the amount of land that is overflowed in Section 23 couldn't be any better than your estimates of the amount of knolls and dry lands in those other pieces?

A. The testimony as to the knolls—

Q. No, I am asking now, is your estimates in one case any better than they are in the other?

A. I would think they would be of the same class.

Q. Then, I don't care to ask for it because it would not be competent. I will ask that all his evidence as to Section 23, Township 17 S., R. 44 East, BE STRICKEN FROM THE RECORD.

Mr. HUNTINGTON.—We resist the motion.

Q. You gave us the value of various classes of land the other day when you testified, do you recall that? A. I do.

Q. And you also stated at that time, if I remember, that as to certain portions of the land the value

(Testimony of Thomas W. Clagett.)

was little and as to other land the increase in value would depend on whether the neighbors living around improved their property; if they improved their property it would make your property more valuable?

A. That question was based—the question was based upon the supposition being put to me of the water being permanently taken from the lands on Willow Creek, and my answer was based upon that supposition.

Q. Well, you did testify that your lands would increase in value if your neighbors improved theirs it would make yours more valuable? [298—242]

A. I testified if the neighbors improved theirs ours would be improved because the neighbors would want ours for pasture; they would be valuable to them.

Q. To them? A. Yes, sir.

Q. And to you—to the company?

A. Yes, sir.

Q. That is the policy of the Eastern Oregon Land Company, to let the neighbors improve their land to improve theirs?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial, argumentative and calling for a mere opinion of the witness.

A. I cannot state what the policy of the company is; they have never advised me of it.

Q. You know they have never made any improvements upon their holdings—

A. Not at this end of the grant.

(Testimony of Thomas W. Clagett.)

Q. Down in this valley?

A. They have made some slight improvement on it.

Q. What?

A. They are at the present time clearing up a tract of land on Willow Creek.

Q. I am talking about the time prior to this suit?

A. It was begun last year.

Q. Just before the beginning of this suit?

A. When was the suit begun?

Q. In October of last year.

A. The clearing was begun some time in the spring or early summer of 1908; I don't remember.

[299—243]

Q. It was commenced after the defendant company commenced their work in that valley, wasn't it?

A. I don't remember.

Q. But you remember the time they commenced constructing that dam up in Sections 27 and 28, don't you?

A. I know about the time they begun; yes, sir.

Q. And you commenced after that to clear up some land?

A. The correspondence relating to this clearing was begun the preceding fall. I cannot state—

Q. I am talking about when they commenced work?

A. I cannot state when the contractor begun work.

Q. How much was contracted to be cleared?

A. Contracted to have 125 acres cleared.

(Testimony of Thomas W. Clagett.)

Q. And you have owned the land in Willow Creek valley for how many years?

A. I believe since 1867.

Q. You claim they have owned it since 1867, this company and its predecessors, and during all that time you finally started to clear up 120 acres of land, haven't you?

A. I believe in Willow Creek that is the extent of the land cleared.

Q. And the value of your land has been improved from time to time from the work and labor of others?

Mr. HUNTINGTON.—Objected to as incompetent, not proper cross-examination, irrelevant, immaterial and argumentative.

A. Undoubtedly.

Q. Now, as to the time in 1908, in the first part of the year during the months of March, February, and April and May, the [300—244] complainant company, the Eastern Oregon Land Company, had its office upstairs in a little stone building over what was the First Bank of Vale at that time?

A. Up until the 15th of May.

Q. Until the 15th of May? A. Yes, sir.

Q. During the months of April and May and thereafter for some time the defendant company, the Willow River Land & Irrigation Company, had its offices upstairs in that same building?

Mr. HUNTINGTON.—Objected to as not proper cross-examination and counsel for complainant here states that if the counsel desires to make this witness their witness upon this subject we shall reserve the

(Testimony of Thomas W. Clagett.)

right to cross-examine him.

A. Why, I think they took offices there in the month of April. I am positive it was not before April and they were tenants in the building when I left there.

Q. And the doors entering your office and the door entering this company's office were in plain view one of the other?

Mr. HUNTINGTON.—Our objection and statement applies to all this testimony.

A. Yes, sir.

Q. And during that time you were the resident agent of this company in charge of their offices?

A. I was.

Q. You know Mr. Leonard Cole?

A. I do. [301—245]

Q. And knew him in 1908? A. I did.

Q. And for several years previous?

A. 1907 I became acquainted with him.

Q. He brought you over to the Town of Vale when you first came here and he was one of the first men you knew here? A. Yes, sir.

Q. Now, during the month of April, the first of April, 1908, and thereafter you knew Mr. Cole was connected with this defendant company, didn't you?

A. I did.

Q. You knew at that time that they were spending money in the constructing of the dam up on Sections 28 and 27? A. I did not.

Q. You knew they were starting in with the irrigation system? A. I did.

(Testimony of Thomas W. Clagett.)

Q. And you knew they were building a dam up on Sections 27 and 8?

A. I knew they were building a dam but I did not know on what sections.

Q. You knew it was on the one where the old mining claim had been?

A. I had never been up there at that time.

Q. You knew the mining claims in that canyon?

A. I did by hearsay.

Q. It was generally known there was mining ground owned by Mr. Leonard Cole?

A. I had no knowledge of it except that I knew he had filings upon that land.

Q. You knew he had filings upon that mining ground dating back to 1894? [302—246]

A. I did.

Q. And you knew the ground had been worked as mining claims for years before that?

A. I did not.

Mr. HUNTINGTON.—I wish to interpose another objection to this line of testimony: Objected to as incompetent, irrelevant, immaterial for all reasons, and particularly for the reason that no mining claims were ever filed which in any way affected, or could affect, the rights of the complainant company or its predecessors in interest, and for the further reason that the matter—the question as to whether or not this land or any part of it is subject to mining claims has been adjudicated by the Department of the Interior prior to the issuance of the patent—the patent offered in evidence and the patent includes the de-

(Testimony of Thomas W. Clagett.)

feudant and all others upon the question. We object to it as not proper cross-examination, the witness not having been asked upon direct examination any question relative, or in any manner pertaining to this subject, and further because it calls for hearsay evidence.

Q. Will you say that it was not generally known in this community and as such known to you that the land in that canyon running through Sections 27 and 28 had not been worked off and on for thirty years and more as a mining property?

A. I don't know what was generally known; I did not know anything of it myself.

Q. You had not heard of it? [303—247]

A. No, sir.

Q. How long after—I believe your name is Mr. Thomas W. Clagett?

A. Yes, sir.

Q. Have you got the copy of the letter which you wrote to Mr. Leonard Cole on May 19th, 1908, the copy of which is set forth in your affidavit dated the 19th day of November, 1908 used in this case?

A. It is my recollection that I delivered those copies to Mr. Huntington.

Mr. HUNTINGTON.—We will concede that is a true copy of that letter.

WITNESS.—I will add that if I did not turn them over to Mr. Huntington they are still in the office.

Mr. HART.—You will admit these are true copies of those two letters?

Mr. HUNTINGTON.—Yes, sir, and we are willing those two letters shall go into the record as the letters and addressed in one case to Leonard Cole and

(Testimony of Thomas W. Clagett.)

in the other case to Mr. D. M. Brogan and the Willow River Land & Irrigation Company, the first being dated May 19th, 1908 and the other June 18th, 1908.

Mr. HART.—Now, under the stipulation, I will read these letters into the record.

Mr. HUNTINGTON.—The only objection I make to that is that I do not want to waive my objection that it is based upon the fact this is not proper cross-examination and you are making him your witness for this purpose. So far as the letters themselves are concerned and the manner of proof—these letters may be read into the record subject, however, to our objection that this examination is not [304—248] proper cross-examination, complainant waiving all questions as to the manner of proving the letters.

Mr. HART.—The first one dated:

“Vale, Oregon, May 19th, 1908.

Mr. Leonard Cole, Vale, Oregon,

Dear Sir:

We are in receipt of a letter from the head office instructing us to inform you that the Eastern Oregon Land Company holds United States Patent to the lands in Sections 21, 27, Township 14 South Range 42 East W. M. which you are undertaking to sell to Mr. D. M. Brogan. And that it intends to assert its right to same and will resist any attempt to flood the land or otherwise enter upon it by injunction suit.

Yours truly,

EASTERN OREGON LAND COMPANY.

By THOMAS W. CLAGETT, Agent.”

(Testimony of Thomas W. Clagett.)

Q. That is the letter that you wrote and sent to Mr. Cole at that time? A. It is.

Q. Previous to that time you had learned that they were doing work upon this reservoir site and were going to make a reservoir there?

A. By hearsay.

Q. And you had communicated that fact to your head office?

A. I had communicated the fact that Mr. Cole was undertaking to convey lands we owned.

Q. And that the new predecessor was going to build a dam so as to make a reservoir to hold the water?

A. I did not know at that time on what land the dam was going but that he was seeking to convey the land. [305—249]

Q. You knew the dam was being built?

A. I did not know what land it was being built on.

Q. Have you got copies of the letters which you wrote to your company at that time?

A. I would have; yes, sir.

Q. And you have their answers?

A. I do have; yes, sir.

Q. I wish you would bring them all into court this afternoon. Now, at the time you wrote this letter you were still occupying joint rooms over here together these two companies?

A. I believe not. The letter, I believe, is dated the 19th of May and I moved the 15th of May.

Q. You had just moved—I mean rooms adjoining? A. Yes, sir.

(Testimony of Thomas W. Clagett.)

Q. Now, you knew that previous to the time you had written this letter to Mr. Cole, and at that time, that large sums of money were being expended in sending lumber up to this canyon for the construction of cement heads and cores and other sums in payment for the labor being performed up there?

A. That is not the fact.

Q. Did you know it then?

A. I did not know it and it was not the fact.

Q. Why wasn't it, the work commenced up there even in March, 1908?

A. The work commenced there and was carried on during the first two months as I say but so that they had a force of four or five men there digging pits too—I never was there until July that year.

Q. When did you first hear they were doing work there?

A. My—I don't know the exact time. The letters I wrote at the time would have been written immediately when I first heard. [306—250]

Q. Now, on June 18th, 1908, Mr. Martin was here in the city or town of Vale? A. Yes, sir.

Q. And at that time, and in the company's office, the following letter was written to Mr. Brogan, which I will read:

“Vale, Oregon, June 18th, 1908.

Mr. D. M. Brogan, and Willow River Land & Irrigation Company, Vale, Oregon.

You are hereby notified that this company objects to and protests against any occupaney or work heretofore, now or hereafter by you or either of you, or

(Testimony of Thomas W. Clagett.)

by any other upon Sections 21 and 27 Township 14 South, Range 42 East, W. M. or any other of its lands without its consent and will hold all parties acting contrary to this notice responsible for all consequences.

Yours faithfully,

WALTER S. MARTIN, President,
EASTERN OREGON LAND COMPANY."

Q. You were present when this letter was written by Mr. Martin?

A. I wrote the letter at his dictation.

Q. And you sent that to Mr. Brogan?

A. Yes, sir.

Q. At that time you knew the work was being done in the construction of the dam to make this reservoir?

A. I did.

Q. And Mr. Martin knew that also?

A. He did.

Q. And you knew that a large sum of money had been expended for that purpose previous to the writing of this letter?

A. I did not so know; no, sir.

Q. Have you been up there recently?

A. Yes, sir, within the last week. [307—251]

Q. After the writing of these letters nothing was done by the company in so far as the Willow River Land & Irrigation Company was concerned, and in so far as Mr. Brogan was concerned or in so far as Mr. Cole was concerned until the time when the present suit was instituted?

A. Nothing that I know of.

(Testimony of Thomas W. Clagett.)

Q. You will bring over all of *this* letters this afternoon so that I can see them?

A. If Mr. Huntington says I shall bring them.

Q. Mr. HART.—No, if Mr. Davis says you shall.

Mr. HUNTINGTON.—Counsel for complainant is entirely willing that the correspondence should be brought.

At the hour of 11:55 o'clock A. M., July 23d, 1909, adjourned until 2:00 o'clock P. M. to-day.

At the hour of 2:00 o'clock P. M., July 23d, 1909, met pursuant to adjournment as above. Present same as before.

THOMAS W. CLAGETT still on stand.

Mr. HART.—Did you find those letters for me, Mr. Clagett?

A. Why, I found some letters, Mr. Hart.

Mr. HUNTINGTON.—Just what letters did you want?

Mr. HART.—I want first the letters he wrote to this company as to what this company was doing along there in May and April, 1908.

A. (Witness produced copy-book.) This letter of April 15th, in which I advised them of the filings of Mr. Leonard Cole that I found the record of our land. It was through these filings that I first became aware Mr. Leonard Cole claimed any interest in our land. [308—252]

(Counsel examines letters.)

Q. Now, this letter that you have first called my attention to is a copy found in your letter-book on page 222 and it is a letter dated April 15th, 1908—

(Testimony of Thomas W. Clagett.)

the letter-book of Mr. Clagett.

WITNESS.—It is not numbered.

Q. Page 222 and the letter is dated April 15th, 1908. Now, will you let me see the answer to that letter? Is that it you have there?

A. No, sir, this is a preceding letter written the 9th of April.

Q. Who is the letter to?

A. Addressed to Balfour, Guthrie & Company, who are the General Agents of the State of Oregon of the Eastern Oregon Land Company. I have no correspondence direct to the head office. I did not bring the answer to that letter.

Q. You have it over to your office?

A. Why, I presume so. My correspondence, of course, are along a great many different subjects embraced in the same letters and I only brought what I thought you wanted.

Mr. HUNTINGTON.—I have the answer to that. (Counsel produces letter.)

(Counsel examines letters.) Now, I will read the letter of April 15th so that it need not mutilate your letter-book.

Mr. HUNTINGTON.—Subject to our general objection.

“April 15th, 1908.

Messrs. Balfour, Guthrie & Co.

Portland, Oregon.

Gentlemen:—

WILLOW CREEK.

Acknowledging receipt of your favor of the 9th, and [309—253] 10th inst. in regard to the above

(Testimony of Thomas W. Clagett.)

we desire to state the following:

On examination *fo* the County records we find that on April 5th, 1907, Leonard Cole entered into an agreement with W. E. Mann, D. R. Dwyer and E. W. Cummings for a consideration of \$15,000 to sell and deliver to them certain placer mining claims and water rights. Amongst said claims are found the S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of 21-14-42, known as the Boswell Placer Mining Claim and recorded December 5th, '94. Also the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Section 27-14-42, recorded February 11th, '97. Also the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of 27-14-42, recorded June 27th, 1903.

A reading of the contract entered into between the parties at that time discloses the purchasers then had in view an irrigation project as under the contract they were to have two weeks to ascertain from the U. S. Geological Survey Reports, the amount of run-off from Willow Creek and to examine the records as to the amount of vacant Government land lying in the Willow Creek Valley.

Also under date March 17th, '08, we find an agreement recorded wherein Leonard Cole, for a consideration of \$20,000 agrees to convey to D. M. Brogan the above described property. These \$20,000 are payable \$5,000 in 90 days, \$5,000 in six months and \$10,000 in one year. Again under date of March 11th,

(Testimony of Thomas W. Clagett.)

'08, we find a contract with Emory Cole recorded whereby he agrees to sell to [310—254] D. M. Brogan 2560 acres at \$32.50 per acre, of which amount \$20,000 is to be paid on or before June 10th, 1908. The following provision is incorporated: 'The total purchase price for said property is to be \$83,200, of which said purchase price said D. M. Brogan and his assigns is to pay the sum of \$20,000 on or before June 10th, 1908, and all of the balance of the purchase price to be due and payable nine months thereafter. It is further agreed that when Mr. Cole has received his \$20,000 as aforesaid, that one-half of all the balance of the money paid into the bank shall be deposited to his credit until the full amount of the purchase price hereinafter stated shall have been paid. It is further agreed that the other one-half of the money shall be deposited in this bank and be used for the development and betterment of reservoirs, ditches, dams, waterways and the purchase of additional ground.' What the moneys are thus referred to is not indicated.

Yours faithfully,

EASTERN OREGON LAND COMPANY,
By THOMAS W. CLAGETT, Agent."

Q. Now, in answer to that letter, the one which I now have was received by you in answer to it?

A. Yes, sir.

Q. I will read from that.

Mr. HUNTINGTON.—We make no objection to the reading of the letter, but renew our general objection.

(Testimony of Thomas W. Clagett.)

“Portland, Oregon, 20th April, 1908.

Eastern Oregon Land Company,

Vale, Oregon. [311—255]

Dear Sirs:—

WILLOW CREEK.

Referred to your letter of the 15th inst. The home office primary lease shows patent issued and there remains the following lands, viz:—

Township 14 South Range 42 East: South $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Section 21—80 acres.

SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Section 21= 40 acres.

All of Section 27 =640 acres.

760 acres.

And the contract between Mr. Leonard Cole and Mr. D. M. Brogan includes:

- (1) N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Section 21—20 acres
SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 21—10 acres
N. $\frac{1}{2}$ of S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Section 21 —40 acres

- (2) NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Section
27 —10 acres

SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Section 27—10 acres

- (3) E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Section 27—20 acres

Pointing to the presumption that Cole claims the latter lands (i. e.) 110 acres adversely to you under mineral entries recorded 5th December, 1894, 11th February, 1897, and 27th June, 1903. We presume the dates of record given are from the Land Office records. It will be well to make sure these dates are not those of filings under placer mining water rights in the County Clerk's office. The question to determine before we settle on the next step in this

(Testimony of Thomas W. Clagett.)

matter is the date of the patents. We are sending a copy of this letter to the home office with the view of obtaining the information there and any suggestions they may have to offer. In the meantime we suggest that you press for a statement from Mr. Cole of the foundation of his claim. It is possible he may have an old tax title.

Yours faithfully,

BALFOUR, GUTHRIE & COMPANY,

W. McKENZIE." [312—256]

Q. Now, kindly let me see the letters written by the company to you dated the 9th and 10th in this letter of April 15th from them to you.

A. I don't think the 10th referred to this matter at all but this is the letter of the 9th.

Q. Now, let me see the one of the 10th also.

(Witness retires to office after letter, returning produced a bunch of letters.)

Q. Now, this letter of April 10th which you have just handed me calls attention to one which you wrote the company of April 3d, antedating yours of April 15th. Please show me that.

(Witness hands counsel copy-book containing letter.)

Q. I now read the letter of April 3d, 1908, as follows—found on page 208 of the book:

“April 3, 1908.

Messrs. Balfour, Guthrie & Company,

Portland, Oregon.

Gentlemen:—

WILLOW CREEK.

Since the visit of Mr. Wallace to Willow Creek the

(Testimony of Thomas W. Clagett.)

settlers have held several meetings and have finally adopted a contract which both the Bench Holders and the Vested Water Right Holders have agreed to. It was completed this evening and is now ready for use. The purpose is to close with the Federation if they can comply with the terms of the contract. And, if they fail, then to seek to deal with any company which can finance the proposition. We were not able to secure a copy of this contract, nor an opportunity to make a copy of it. We shall therefore have to ask you to seek to see the copy which has today been forwarded to Mr. Wallace. We need not again direct your [313—257] attention to consideration of the contingency of the Federation putting in a moderate capacity project to begin with which they will not afterward be able to extend to those limits which the needs of the country demand, and a consequent position of the E. O. L. Company should they not now subscribe for water.

Mr. Brogan and associates have organized their company and to-day are in close confab with Mr. Nott, the Payette Engineer who prepared the plans and maps of the Malheur Irrigation Company. Yesterday Captain Dwyer and Mr. O'Donnell filed desert claims on the N. $\frac{1}{2}$ of Section 35 and the S. $\frac{1}{2}$ of Section 26-15-42. We have had a little talk with Captain Dwyer but got no information. He said he would be here all the time after a little while as there was a great deal of work to be done up the creek.

The committee of Willow Creek settlers were in Vale to-day, bringing to a conclusion the contract

(Testimony of Thomas W. Clagett.)

which we have said is to be sent on to Mr. Wallace, and so far as we learned (though the Seattle Company knew of the projected move) they made no effort to avert same. It would seem to us that if they had started out to put in a project which is to cover the entire valley they would attempt to thwart these negotiations with Mr. Wallace. It would appear that either they have an arrangement with the latter whereby they expect to succeed to the interest which the Federation will secure if these contracts are signed or else they are seeking to simply further a project serving the small body of land which they have undertaken to buy.

Yours faithfully,

EASTERN OREGON LAND COMPANY,

By THOMAS W. CLAGETT, Agent."

[314—258]

Now, I read a letter dated April 9th, 1908.

"Portland, Oregon, 9th April, 1908.

Eastern Oregon Land Company,

Vale, Oregon.

Dear Sirs:—

WILLOW CREEK.

We have learned to-day in an incidental way that Mr. Leonard Cole has come under obligation to the Seattle Syndicate to deliver a good title to them for certain tracts of land in the gorge above the Emory Cole farm, which lands are shown upon blue prints exhibited to our informant and includes certain lands the title to which of record *in* vested in yourselves. We recommend that you do your best to find the

(Testimony of Thomas W. Clagett.)

ground upon which Cole expects to deliver your lands to the Seattle Syndicate. Possibly some old mineral claim filing is the basis of his claim if any.

Yours faithfully,

BALFOUR, GUTHRIE & COMPANY,
W. McKENZIE."

Q. I now read the letter of April 10th, 1908.

"Portland, Oregon, 10th April, 1908.

Eastern Oregon Land Company,

Vale, Oregon.

Dear Sirs:—

Willow Creek.

We have gone carefully over all the correspondence and inquired closely in various directions to get some light upon your remarks under date 3rd instant. (i. e.) the strangeness of the Seattle Syndicate abstention so far from any open effort to put forward a large project instead of the small one which the rights they are known to possess [315—259] indicate; and we cannot avoid the conclusion which you also appear to have reached that a secret arrangement with the Federation people or with the Malheur Irrigation Company exist through which in due time they expect it will be possible to come out with a project large enough to cover the whole valley.

The fall of the creek about where the Leonard Cole placer claims are situated we were told last year is about fifty feet per mile and the canyon is a mere gorge. The height of a dam placed there must at least equal the fall in the distance which the stored water will expand back from the dam. To attain a

(Testimony of Thomas W. Clagett.)

reservoir capacity which will supply the riparian owners and the other lands from which the bulk of the profit must come will mean a dam of probably three hundred feet in height. Of course such a structure is prohibited by comparison of cost with the reasonable expectation of profit from merely an irrigation undertaking. There is the possibility of the dam being placed where the water can first be used on the placer claims and afterwards for irrigation. There would be a probable gain in that. It is difficult to understand why Leonard Cole can expect to get a round sum of money for his claims if their value consists merely in their suitability for reservoir sites. Then again we have thought it quite possible the placer claims in the Malheur City section were involved, but of course this is mere speculation.

The broad fact remains we think unless Cow Valley is used, which is by no means clear because of limited watershed that there must be several units of storage capacity on the upper creek to provide sufficient summer irrigation water for both the valley and bench lands. Economy in dam [316—260] construction and the saving of all the run off argues in favor of that view. The Malheur Irrigation Company in possession of the Hoskins Stone Claim prejudices the Federation's reservoir site adjoining. And the known trickiness of some of the Willow Creek people who are active in getting contracts etc., suggests a very careful watching of all the parties interested. If the Seattle Syndicate is in fact backed by money the men are otherwise capable of working a

(Testimony of Thomas W. Clagett.)

silent game upon everyone concerned. We trust the appeal of Mr. Huntington will result in something.

Yours faithfully,

BALFOUR, GUTHRIE & COMPANY,
W. McKENZIE."

Q. Now, Mr. Clagett, when he speaks of the dams and reservoirs being built for the purpose of conserving the water and used the expression "saving of all the run-off," you understand by that that it was to conserve the spring and flood waters didn't you?

A. Yes, sir.

Q. And the company had that knowledge also that that was the purpose of that work up there?

A. Undoubtedly.

Q. Now, I call your attention to the expression used in your letter of April 3d, 1908, which I have just read preceding the reading of those two letters, the expression which I call your attention to is this: "Mr. Brogan and associates have organized their company and to-day are in close confab with William Noot, the Payette Engineer who prepared the plans and maps of the Malheur Irrigation Company." Now, [317—261] at the date of that letter, April 3d, 1908, when you wrote it to your head people, Mr. Mackenzie, you knew the defendant company, the Willow River Land & Irrigation Company, had been organized? A. Evidently.

Q. And you also knew—or at that time your office door was right near to the company's door in the same building and on the same floor, and right near the entrance of the Willow River Land & Irrigation

(Testimony of Thomas W. Clagett.)

Company? A. It was.

Q. And you were keeping sufficient observation upon the doings of the persons, who were specified as Mr. Brogan and associates, as to know who they were consulting with and negotiating with at that time?

A. I observed them as closely as I could.

Q. And you knew at that time there had been prepared plans and specifications and drawings for the construction of dams upon Sections 27 and 28?

A. I think I didn't know it at that time.

Q. You knew that surveying work had been going on for a long time previous?

A. Carried on by Mr. Brogan and his associates?

Q. Yes, sir.

A. I never knew and did not know of any surveying done preceding the construction of their dam where—

Q. It must have been done preceding the construction of the dam?

A. I never knew who did the work.

Q. You had met Mr. Brogan over here in Vale during the month of March and February of that year preceding April, hadn't you? [318—262]

A. I don't remember when I first met him.

Q. Don't you remember of meeting him here previous to the writing of this letter?

A. Yes, sir, I met him prior to the writing of that letter.

Q. And you knew he was here for the purpose of taking over that gulch and putting in a dam, and irri-

(Testimony of Thomas W. Clagett.)

gation works and reservoir and talking about it?

A. Yes, sir.

Q. And previous to him investing any money you never notified him of owning any land in that canyon?

A. The correspondence in the letter of April was the first I ever knew of—

Q. (Read previous question to witness.) Answer that question? A. I never did.

Q. Now show me the letter previous to April 3d that you wrote them about Mr. Brogan. I desire to read a part of the letter of April 1st, beginning on page 200 of copy-book. I want to read a part of the letter dated April 1st, 1908, found at page 200.

April 1st, 1908.

Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

Gentlemen:—

* * * * * This same question,—
the development of a moderate capacity project,—is
what has been troubling us in connection with the
projected move of Mr. Brogan and his associates.

* * * * *

We have not previously written you in regard to this as we have been endeavoring to ascertain what active steps Mr. [319—263] Brogan was taking. We have heard he had engineers in the field and also some men at work in the neighborhood of the property of Leonard Cole. We might digress here to say that so far as we have been able to ascertain the interest of Leonard Cole, or rather the interest which he claims, involves about seven miles of creek bed which

(Testimony of Thomas W. Clagett.)

has been mined over more or less for the last thirty-five years and also a ditch some five miles in length having a water right. But as the water from the ditch has always been returned to the creek it is not generally believed he has any power under the right to divert the water elsewhere. What we have been afraid of is that Mr. Brogan and associates intended upon this ground of Leonard Cole to establish a reservoir and appropriate sufficient flood water to develop ten thousand acres of land which they had contracts on. As you will understand if all the best land in the valley is thus provided for it cannot be foretold how long the remaining unirrigated lands will be left in that condition. We cannot find out what these men are doing at this time. In conversation with Emory Cole on Friday last we learned he was of the opinion the contemplated move was as we have surmised it might be. But he seems to feel that a reservoir put in upon the site which they are considering would be of ultimate value even with a full irrigation undertaking carried out, since it would catch the water of three tributaries of Willow Creek which enter that stream below the site of the Beers and McPherson ranches.

Yesterday morning Leonard Cole arrived at Vale from Payette, took offices in the First Bank of Vale building and proceeded to have them calcimined and fitted up. He stated he had come here to represent the interests of this [320—264] Seattle Syndicate. On last night's train Mr. Brogan, Captain Dwyer, two Mr. O'Donnell's from Chicago and two other gentle-

(Testimony of Thomas W. Clagett.)

men whose names I could not learn, arrived. We were able to have a little talk with Leonard Cole and his statement is that the undertaking of the company will be sufficient to meet all the requirements of Willow Creek land, but * * * must confess we have our misgivings in regard to the present situation. We have felt all the time that the Eastern Oregon Land Company was making a mistake in not adopting an active program in regard to Willow Creek, and if we were confident these people only contemplated a small undertaking would advise a consideration of steps to secure options upon a portion of the Willow Creek lands which control vested rights.

Yours faithfully,

EASTERN OREGON LAND COMPANY,

By THOMAS W. CLAGETT, Agent.

Mr. HUNTINGTON.—We move to strike out that part of the letter *reads* which begins with the words “we have felt all the time” through to the end of the letter, except the signature, for the general reasons heretofore urged and for the further reason that it is incompetent, a mere expression of opinion from a sub-agent to a general agent, in no way binding upon the complainant and wholly immaterial and irrelevant to this case.

Q. Mr. Clagett, you advised your company under this letter of April 1st, I have just read in substance that if “We were confident these people only contemplated a small undertaking would advise that you secure options, etc., on the lands,” [321—265] The reason *why advised* that at that time was so as to

(Testimony of Thomas W. Clagett.)

get control by options of land in order to prevent the present company from going on with the work, wasn't it?

A. It was desired to checkmate them.

Q. It was desired to checkmate them. In other words it was the intent to prevent them from having land to irrigate?

A. No, the intent was to protect our own interests.

Q. To get options on other people's lands?

A. The letter itself states the object for which those options were to be taken—it was in order to secure vested water rights.

Q. Under which you could formulate a suit in court against the present company, was that the intent?

A. I don't remember—I don't remember what I had in mind. I would say it was not what I had in mind.

Q. What do you mean by "checkmating them"?

A. Using it as it is ordinarily used—to stop their procedure.

Q. To stop their procedure. Now, then you did not succeed in getting these options on the superior water rights, did you?

Mr. HUNTINGTON.—Objected to for the same reasons as heretofore stated.

A. I had no power to take options and never was authorized to do so.

Q. You never took any?

A. No, sir.

(Testimony of Thomas W. Olagett.)

Q. And in that way you did not checkmate or attempt to checkmate the present company?

A. No, sir, I didn't checkmate them in that way.

[322—266]

Q. But in order to accomplish the same purpose of checkmating them then you brought this suit?

A. The officers of the company—

Q. That was what it was brought for?

A. Undoubtedly.

Q. Now, the purpose of bringing the suit then was to prevent the present company from making certain improvements in the valley, wasn't it?

A. No, I think not.

Q. I asked you a moment ago when you wrote the letter of April 3d if you knew at that time that surveys had been made up there on the reservoir site, and you told me no. I ask you, do you still wish to say that in view of the contents of this letter?

A. I do not recall of any surveys having been made. The letter states that engineers had been put into the field. I did not recall that at the time I testified.

Q. You knew also at that time that Mr. Brogan and his associates intended to establish upon the ground of Leonard Cole a reservoir and appropriate sufficient water to develop 10,000 acres of land, didn't you?

A. I knew they were trying to do that.

Q. And you knew they were figuring on putting in the reservoir on the mining claims of Leonard

(Testimony of Thomas W. Clagett.)

Cole's in that valley? A. I did.

Q. And you knew that property had been used for mining claims for thirty-five years?

A. Only by hearsay.

Q. Then, you knew that Mr. Leonard Cole had filed on those mining claims and had been working them since 1894, the date set forth in one of your other letters? [323—267]

A. Not at that time.

Q. You did know that a few days afterwards when you wrote the letter of April 15th?

A. I knew it when I wrote that letter, yes, sir.

Q. I will read the letter of March 30th, 1908, portions of it.

Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

Gentlemen:—

We have to acknowledge yours of 18th March.
* * * Immediately or soon after the operations of Mr. Brogan took form, and as both of the parties optioned their entire holdings they of course refused, pending the determination of the question as to whether they were to remove from the locality to consider a renewal.

* * * * * * * *

EASTERN OREGON LAND COMPANY,

By THOMAS W. CLAGETT, Agent.

Q. Then, as early as March 30th, 1908, you knew Mr. Brogan was in here and knew what he had been doing.

A. In relation to the options we did.

(Testimony of Thomas W. Clagett.)

Q. And options pertained to the irrigation proposition? A. We presumed so.

Q. I will read from a portion of a letter beginning on page 113, dated February 5th, 1908, the part being read is from page 114.

Mr. HUNTINGTON.—We make the objection, in addition to the general objection which goes to all of this, that this letter is irrelevant and incompetent in that it in no [324—268] way affects the defendant company or relates to it or to any of its operations.

Feb. 5th, 1908.

Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

Gentlemen:—

* * * * * * *

We did not succeed in getting from Mr. Cole any information in regard to the operation of the Syndicate aside from the fact that it was disclosed to us why in a measure Mr. Cole was connected with the enterprise. Probably that connection comes from the control which he holds of considerable of the creek bottom and the water rights in connection with his placer undertaking. He informed us that Colonel Mann was not interested in the project now contemplated. The members of the Syndicate all being Alaska Mining men. If he is advised as to what the contemplated project is he would not state anything in regard to it.

* * * * * * *

EASTERN OREGON LAND COMPANY,
By THOMAS W. CLAGETT, Agent.

(Testimony of Thomas W. Clagett.)

You know that the parties mentioned there as Alaska Mining men has connection with Mr. Brogan and other men connected with this present company?

A. My recollection, though I cannot be positive about it, is that Mr. Brogan at that time had not appeared on the scene.

Q. Hadn't he been down to Vale two or three times previous to then?

A. He might have been. I cannot remember when Mr. Brogan first came here. [325—269]

Q. Do you know a gentleman by the name of Nelson Bennett? A. I know of him.

Q. Do you recall the date he was down here and went out over Willow Creek Valley and went over the dam site?

A. I referred to the former contractor who is dead; I don't know any other.

Q. When did he die? The one living in Tacoma?

A. Yes, sir.

Q. He is not dead unless he died within the last day or two. Did you meet him here when he went over it with Mr. Brogan?

A. No, sir, I never knew of him being here in this country.

Q. I now read—I believe you said awhile ago that last letter dated in February you didn't know Mr. Brogan at that time?

A. That is my recollection of it.

Q. After I read this see if you are refreshed upon that subject.

Mr. HUNTINGTON.—We want to object to this,

(Testimony of Thomas W. Clagett.)

in addition to the general objection that it is incompetent, immaterial in that it in no way relates to the defendant company or any of its operations and has nothing to do with this case.

Mr. HART.—Reading from page 66 of letter copy-book:

January 1st, 1908.

Balfour, Guthrie & Company,
Portland, Oregon.

Gentlemen:—

* * * Since I last wrote you have had a conversation with Emory Cole. He is very positive [326—270] Captain Dwyer and associates contemplates an irrigation project and does not think their mining venture is what they have in view. In fact, in his opinion, the syndicate intends to use the basin which they have been mining on—covering five to six hundred acres—as a reservoir site. He states it is a very good one, controlling not only the Willow Creek water, but also two tributaries which come in below the Beers and McPherson sites. It will have a capacity of about 10,000 acre feet of water. From his conversation with Captain Dwyer he believes it is their intention to buy up the lands along the creek having a monopoly of the normal water flow. The reserve of water is then to be held to give these lands, and whatever other they may have water for, a sufficient supply during the entire season. As you know they now have only half enough water. He states that unless Captain Dwyer is misrepresenting the lands they are buying will be platted into small hold-

(Testimony of Thomas W. Clagett.)

ings and colonized; that their arrangements are all made with a responsible party who makes a specialty of colonizing lands. I asked Mr. Cole if he knew who was putting up the money. He said he believed Brogan was putting in more than the Captain, and that there was associated with them a third party whose name he could not remember. Being asked regarding Colonel Mann he said he overheard a conversation at his place between Brogan and Dwyer, and that they were then discussing a letter they had received from Colonel Mann advising them he would invest \$25,000 in the enterprise. Cole stated they seemed to be surprised the Colonel had come in. Captain Dwyer has not yet arrived at Vale.

Yours faithfully,

EASTERN OREGON LAND COMPANY,

By THOMAS W. CLAGETT, Agent.

[327—271]

Mr. HUNTINGTON.—We move to strike out this letter.

Mr. HART.—Wait a second, there is a postscript added.

“If the intentions of the syndicate are what has been outlined we are to consider whether their consummation will not retard the developement of the Willow Creek lands. However, it does not seem to me these people are engaged in a project of no greater comprehensiveness.”

Mr. HUNTINGTON.—We move to strike out all of the offer, for the reasons stated in our objection thereto, and for the additional reason that it is a

(Testimony of Thomas W. Olagett.)

mere report of hearsay and wholly incompetent, irrelevant and immaterial.

Q. Now, you did then know as early as January first that Mr. Brogan was connected with the proposition, and that it was the intent to utilize the bed of the stream and put in the reservoir for irrigation works?

A. I evidently knew of Mr. Brogan at that time.

Q. Now, I will read from your letter, page 228, April 17th, 1908:

April 17th, 1908.

Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

Dear Sirs:—

Willow River Land and Irrigation Company is the title of the corporation formed by D. M. Brogan and associates. The latter have now filed the map of their Preliminary Survey showing general route of their canal. As so far shown it has no very great length and the dimensions and locations of the dam indicate a small project only. We [328—272] enclose a plat showing the location of the canal, and on this we have also set forth the land under option from Emory Cole and the 1600 acres which have been filed on under the Desert Act.

As to what the plan of Mr. Brogan is only time will disclose. It is possible the plat now before us sets forth what he has in view, i. e., the putting in of a small project at moderate cost to irrigate the limited acreage in which they are interested. Again this may be the beginning unit only. If we were to

(Testimony of Thomas W. Clagett.)

hazard a guess as to what the future may disclose we would say it would not surprise us if eventually the Malheur Irrigation Company holdings passed to Brogan's company. * * *

Yours faithfully,

EASTERN OREGON LAND COMPANY,

By THOMAS W. CLAGETT, Agent.

Mr. HART.—I will read from a letter dated April 25th, 1908, page 234:

April 25th, 1908.

Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

Gentlemen:—

WILLOW RIVER.

* * * * *

Referring to your letter of 20th of April regarding the adverse claim of Mr. Cole to company land, we have to state the dates given by us are those on file in the County Clerk's office of Malheur County, of Placer Mining Claims. We have talked with him in regard to the foundation of his claim, and it is based upon these records. We understand this land along Willow Creek has been mined off and on ever [329—273] since 1862.

Yours faithfully,

EASTERN OREGON LAND COMPANY,

By THOMAS W. CLAGETT, Agent.

Mr. HART.—Now, I call your attention to page 270. You observe that the two letters upon that date—both dated May 19th, 1908, one addressed to Mr. D. M. Brogan of Vale, Oregon, the other to Mr.

(Testimony of Thomas W. Clagett.)

Leonard Cole. Did you send the originals of these two letters? A. I did.

Q. I will read the one addressed to Mr. D. M. Brogan, Esquire.

May 19th, 1908.

Mr. D. M. Brogan, Esq.,
Vale, Oregon.

Dear Sir:—

The head office has instructed us to inform you that the Eastern Oregon Land Company is the owner of certain lands in Sections 21 and 27, Township 14 South, Range 42 East, which Mr. Leonard Cole has agreed to convey to you, its title being derived from U. S. Patents, and that it will resist any attempt on the part of Mr. Cole to transfer the land to you or to put you in possession thereof by injunction suit.

Yours very truly,

EASTERN OREGON LAND COMPANY,

By THOMAS W. CLAGETT, Agent.

Mr. HART.—The other letter which is here addressed to Mr. Leonard Cole is the one I read to you before dinner? A. Yes, sir. [330—274]

Mr. HART.—I will not reread it. At the time you wrote this letter of May 19th to Mr. Brogan you knew that he or his company was already in the possession of that property out there and constructing that dam?

A. I had been told so, but I never was up there.

Q. And you reported it as a fact to the company?

A. I did.

(Testimony of Thomas W. Clagett.)

Q. You knew they had bought large quantities of great value of material and sent it up to that dam site? A. I had not.

Q. Hadn't you seen loads of lumber and cement going up there?

A. I don't think I saw any lumber. The cement I saw hauled out, but I do not remember when I saw it.

Q. But you had been informed that they were in construction of the dam and had so reported it to the company?

A. That is true; yes, sir.

Q. I now desire to read a letter found on page 271: Omitting a part.

May 24th, 1908.

Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

Gentlemen:—

We have been absent on Willow Creek seeking to complete our indemnity selections or would have replied earlier to your favors of 8th and 19th current. In regard to the claim of Mr. Leonard Cole and your request that we send to Messrs. Huntington & Wilson a statement of the facts as to the claim Mr. Cole is asserting, we have not addressed any communication to them as we feel there is nothing to be gained thereby. As we formerly advised you, the basis of Mr. Cole's claim is the Placer Mining filings on record in this County. When we talked with him some time ago in regard [331—275] thereto he asserted he had had possession of the land through purchase

(Testimony of Thomas W. Clagett.)

from the original locators of the placer mining claims long past the time necessary for adverse possession to have run. We replied, "It is true the Boswell claim was filed on the 5th December, 1894, and one on the 11th of February, '97, but the third was not filed until the 27th of June, 1903." To which he replied: "Well, the latter is of no value, anyway, and I have had possession of the first two tracts for over ten years of time and have mined same every season."

As directed by yourselves and the Messrs. Huntington & Wilson, we addressed to Mr. Cole, and to Mr. Brogan letters stating that the company claimed title to the particular tracts in Sections 21 and 27, which the former had agreed to convey to the latter, and that it would resist any attempt on the part of either of them to take possession of or claim the land, and would enjoin Mr. Cole if he attempted to transfer the same to Mr. Brogan. It so happened that just after we posted the letters, as we came out of the office we met the latter and so said to him: "We have just dropped a *little* for you into the office." He said: "All right," and though we have passed him repeatedly and also Mr. Cole, they have neither of them ever referred to the matter.

We have been delaying communicating with you on the subject as we have been seeking to come to a conclusion as to what Mr. Brogan is seeking to accomplish, and as to what the outcome of affairs on Willow Creek is to be. We do not know that we can give you any basis for our conclusion, but what we

(Testimony of Thomas W. Clagett.)

have arrived at in our own mind is that Mr. Brogan and his associates intended to force the E. O. L. Company [332—276] and probably also other private holders to dispose of their land to them on such terms as they should dictate. We believe it was their intention, and we know it was their effort, to purchase all the lands on the creek which have vested water rights. They then intended to make an appropriation of flood water, and having thus gotten the whip hand they would have been in position to say, we have now the control on Willow Creek and you can either sell your lands to us at the price we name or you can purchase water from us at our price. And we believe had they been able to make their financial arrangements when they first undertook the promotion and had the Federation not become active and so serve to thwart their purpose they would have been able to hold up both ourselves and all the dry land holders. We think the activity of the Federation has given them a very disagreeable jolt, though we are not prepared to state what the outcome is going to be. The Federation has succeeded in signing up contracts and mortgages for something over 15,000 acres of land. And we understand they estimate that when all the contracts are signed, a portion being as yet held up on account of the absence of some of the parties, they will have close to 20,000 acres of signed contracts. There is some doubt in our mind as to what the position is going to be of the people who have given mortgages upon their homesteads and desert claims to which as yet they

(Testimony of Thomas W. Clagett.)

have no title. But we have not been able to get the time to look the matter up and so do not know whether any issue will arise therefrom which will defeat the progress of the Federation. As you know the latter under their contract is not bound to proceed unless contracts for 25,000 acres are signed up. However, we are getting away from our subject, which was that we believe [333—277] this present activity of the Federation has to a large extent checkmated Mr. Brogan. Though as we have said, he may still have something up his sleeve. However, he has not made any move to take up the Emory Cole option, which, as we have formerly advised you, must be done before the 10th of June. We therefore feel that until he makes a move in that direction there is no need for haste in regard to this claim of Leonard Cole. We will know shortly whether Mr. Brogan is to proceed, and when Mr. Martin is here we believe it will be timely for us to then look at this land with a view of meeting Mr. Cole's claim and present possession. We do not think the company is risking anything by this delay, and as we will then be fully informed in regard to the premises, we have judged it was unnecessary at this time to address the attorneys on this subject, and trust our course will meet with your approval. We enclose herewith a plat showing the lands affected by the claim of Mr. Cole.

* * * * *

(Signed) THE EASTERN OREGON LAND
COMPANY,

By THOMAS W. CLAGETT, Agent.

(Testimony of Thomas W. Clagett.)

Mr. HUNTINGTON.—Here counsel for complainant states to the counsel for defendant, who has been permitted to have possession of the letter-press book of the witness covering the period from October 18th, 1907, down to April 12th, 1909, and who has been permitted to examine the letter-book from page to page in so far as he may have desired down to and including the letter of May 24th, 1908, addressed to Balfour, Guthrie & Company, here states that counsel for defendant may have possession of the book and examine the same from the last-named date down to and including June 16th, 1908; [334—278] in other words, down to July 11th, 1908, but counsel for complainant declines for the present to allow counsel for defendant to examine the letter-book beyond July 11th, 1908, for the reason that whatever correspondence may have taken place between this witness as agent of the company or otherwise and the defendant company or anyone else is the confidential correspondence between principal and agent and cannot in any way have a bearing upon the issues in this case. And the book is surrendered to counsel for defendant at this present time with the understanding that he will examine it only down to and including July 11th, 1908. And, if he declines to agree that he will not examine the letter-book from and after the date of the last notice, to wit, June 18th, 1908, counsel for complainant declines to surrender the book for further examination.

Mr. HART.—I will not examine the book farther and beyond page 297 or to July 11th as counsel states.

(Testimony of Thomas W. Clagett.)

I claim the right on behalf of the defendant to examine the book and ascertain the truth and read it into this record of facts which will bear out and support the contention of the defendant clear through this book or any other book which the complainant company has, or any of its agents have. With that understanding I will proceed to read these letters you have said I can. I am not bound to hand it back to you but I shall hand it to the master and ask him to impound it and keep it.

(Counsel examines letter-book further.)

Mr. HART.—I will ask you, Mr. Davis, to take possession of this book and return it with your exhibits into court until I am permitted to examine it—until further order of the court. [335—279] ,

Mr. HUNTINGTON.—I ask the privilege of examining the book.

(Counsel examines the book.)

Mr. HART.—Let me see the letters you received from the Eastern Oregon Land Company during that same period of time—the bunch of letters from 1907, when you came out, up to the present time.

WITNESS.—There are copies of Mr. Huntington's letters in here.

Mr. HUNTINGTON.—If you are going to use those letters I would certainly want to examine them first.

Mr. HART.—I will not use them until you see them.

Mr. HART.—I am asking for copies of all those letters. I will call your attention to them, Mr. Hun-

(Testimony of Thomas W. Clagett.)

tington, before I use them. I have got a right to use the letters.

WITNESS.—These run down to the present time.

Mr. HUNTINGTON.—Cut out those from and after July 11th, 1908.

Mr. HART.—The letter is then read dated Portland, Oregon May 26th, 1908, addressed to Eastern Oregon Land Company, Vale, Oregon, signed by Balfour, Guthrie & Company, William Mackenzie. (Copy into record.) (Return original to Vale.)

Portland, Oregon, 26th May 1908.

Eastern Oregon Land Co.,

Vale, Oregon.

Dear Sirs:—

WILLOW CREEK.

We have received the plats showing the Boswell Placer Mining Claim, recorded December 5th, 1894, which occupies part of Section 21-14-42; also showing the lands in Section 27 same Township and Range, known as the Insenhorfor Mining Claims, recorded February 11th, 1897, and the Otilda Placer Mining Claim recorded June 27th, 1903, both asserted to be owned by Mr. Leonard Cole by virtue of purchase [336—280] from the preceding locators and by adverse possession. We have also received your letter of 24th inst. accompanying the plat. We wrote you this morning before your letter as above came in advising you that Patent No. 8 issued 28th May 1902 covered these lands. The Patent in fact covers 760 acres. We described these 760 acres in our letter to you of 20th ulto. We note

(Testimony of Thomas W. Clagett.)

from your letter received today, referred to above, you have not considered it necessary to communicate with Messrs. Huntington & Wilson with a full report of Mr. Leonard Cole's Claim, which Report the Home Office suggested should be sent to them, for the reason the condition of affairs on Willow Creek may result in nothing being done by Mr. Brogan toward the purchase of Mr. Cole's Mining Claims, or toward the construction of an Irrigation System since it appears the Federation, through obtaining Contracts from the land owners, may cut out the Seattle Syndicate. We agree with you it is inadvisable to create work and incur expense for legal services if it doesn't seem immediately necessary to do so. On the other hand, we are somewhat expecting there will be disclosures whereby the Federation and the Seattle Syndicate may prove to have a private agreement among themselves. It is possible also the Malheur Irrigation Company will be heard from and, altogether, the situation is so complex the thing to do is to take the earliest possible action which will best protect your interests. Messrs. Huntington & Wilson have been consulted and have advised you to notify both Mr. Cole and Mr. Brogan, which you have done. We would suppose this notification would put Mr. Brogan in the position of dealing with Mr. Cole at his peril, and we do not see that you can do anything more. But, as to Mr. Cole himself we are now confronted with the [337—281] fact that the Boswell and Isenhorfor claims were filed upon prior to the issue of the patent to your-

(Testimony of Thomas W. Clagett.)

selves. If mining claims by proper filing, and a continuation from year to year of a certain amount of work, let it be even moderate so long as it is within the statute can hold public lands until the locators or filers choose to apply for a patent, then it would seem that there is occasion to examine carefully into Mr. Cole's title and if it is good that would end the question of his right. On the other hand, a patent has been issued to yourselves and it falls upon you to develop such facts as can be obtained locally to show that it is good as against Mr. Cole or anyone else. We hardly think it prudent to let this matter drag along. These lands in the gorge are undoubtedly of more or less strategic importance if they are not valuable for mineral. It is quite possible that there may be so many legal questions to deal with when Mr. Martin gets to Vale that Mr. Huntington may be called upon to go up there to deal with any questions requiring legal attention. In that event the information you are able to acquire before that time will be useful in consultation with Mr. Huntington. We are well aware there is much difficulty in getting reliable information, and in pushing Mr. Cole or Mr. Brogan to show their hands, but we do not see how this can be avoided and we trust that you will be able to accomplish something in that direction without much delay.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

W. MACKENZIE. [338—282]

Mr. HUNTINGTON.—We desire to renew our

(Testimony of Thomas W. Clagett.)

original objection to each and all of the offers upon the ground that it is not proper cross-examination, irrelevant, and for the further reason that any correspondence subsequent to the first notice or notices to the officers of the defendant company, to wit the notices of May 19th, 1908, can have no bearing upon the issues in this case, and for the further reason that they are correspondence between two agents of the plaintiff company—the managing agent and the subordinate agent—and are confidential. We make the further general objection, and ask that this objection be considered as to all the cross-examination of this witness relative to correspondence between his office and Balfour, Guthrie & Company, that if the same is offered for the purpose of establishing an estoppel it has not been properly pleaded, and the evidence is not warranted by the pleadings.

Mr. HART.—I now offer the following letter in evidence and ask that same be copied into the record: May 4th, 1908, dated at Portland, Oregon, and addressed to the Eastern Oregon Land Company at Vale and signed Balfour, Guthrie & Company by Mr. Mackenzie.

Portland, Oregon, 4th May, 1908.

Eastern Oregon Land Co.,

Vale, Oregon.

Dear Sirs:— Mr. Leonard Cole.

We are advised by Messrs. Huntington & Wilson, The Dalles, under date 1st inst., received this fore-

(Testimony of Thomas W. Clagett.)

noon, that they have instructed you to notify this man, also the Vendee under a Contract from him, certain lands under same have been patented to you and you will take steps by injunction [339—283] to protect your proprietary rights if either or both of them persist in a claim of ownership. Upon writing them to this effect and you do not get any reply be good enough to advise us so that we may take up the matter in greater detail with the *Home Office* and with *Messrs. Huntington & Wilson*.

We hear it mentioned here there is no doubt at all the Seattle *Sundicate* have made arrangements to finance the construction of their Irrigation System. We have heard nothing of Mr. Wallace since he left here.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

W. MACKENZIE.

Mr. HART.—I offer in evidence the letter dated Portland, Oregon, 19th May, 1908, addressed to Eastern Oregon Land Company, Vale, Oregon, signed by Balfour, Guthrie & Co., W. Mackenzie, which reads as follows: (Return original to Vale.)

Portland, Oregon, 19th May, 1908.

Eastern Oregon Land Co.,

Vale, Oregon.

Dear Sirs:—

LEONARD COLE.

The *Home Office* has called upon us to obtain from you a detailed relation of this man's Claim to the lands upon Willow Creek above Mr. Emory Cole's

(Testimony of Thomas W. Clagett.)

farm for delivery to Messrs. Huntington & Wilson, from whom they desire an opinion upon the statement of facts thus submitted. Will you be good enough to do what you can at the earliest possible moment to send this statement to Messrs. Huntington & Wilson, and to ask them when so doing to communicate their views in respect thereto direct to the *Home Office*. We think this should be done so [340—284] as to save time, as we understand Messrs. Martin intend to proceed north from San Francisco about the end of the month. It may be some object to them to have the legal opinion in their hands before coming here. We have also been asked to express ourselves in respect to the position of matters in a separate Report, to be sent to them along with a rough plat on the land in dispute, and our recommendations. Will you good enough to send us a Copy of your statement of facts to Messrs. Huntington & Wilson, and the description of the lands if these are not embodied in the statement, so that we can comply with the request of the *Home Office*. We suppose it is to be quite difficult for you to cause Mr. Cole to make an unequivocal statement as to the basis of his Claim to the land. As this is the gist of the whole matter if you cannot get it our impression is you had better let the whole matter rest until the land can be examined and Mr. Cole, or Mr. Brogan can be met face to face by the Officers of the Company. Of course, if delay appears to be working against your interests it will be well to proceed,

(Testimony of Thomas W. Clagett.)

taking chances that nothing will be lost by expedition at your end.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

W. MACKENZIE.

Mr. HUNTINGTON.—Counsel for complainant here states that he objects on behalf of the complainant to the inspection by counsel for defendant, and to the production in evidence of any correspondence between this witness and Balfour, Guthrie & Company or this witness and the Eastern Oregon Land Company, or its attorneys, subsequent to the date of the last notices to D. M. Brogan and defendant company of date June 18th, 1908, [341—285] and refuses to produce any such correspondence for the reason that the same is not proper cross-examination, this witness never having been asked concerning any such correspondence, that it contains confidential reports from a *su*-agent to the principal agent and the principal, and from the agent to the attorneys for the defendant company (complainant), and for the further reason that such evidence is wholly unwarranted by the pleadings, as incompetent, irrelevant and immaterial. Counsel for complainant further objects to surrender to the commissioner any of this correspondence, but states that he will submit to the ruling of the commissioner upon this matter, and, should the commissioner insist upon the production of such correspondence, it will be surrendered to the commissioner with the understanding that such correspondence is placed under seal so that it cannot be

(Testimony of Thomas W. Clagett.)

examined, and so remain subject to the order of the Court.

Mr. HART.—I wish to object to that portion of counsel's statement wherein he lays down power, or limitations of power of this commissioner. I demand the privilege for the purpose of ascertaining the truth, and in the cross-examination of this witness, and for the purpose of ascertaining facts which will establish the contention of the defendant in this case, and will disprove the contention of the complainant to continue the examination of this book on behalf of the defendant company.

EXAMINER.—I will take charge of the book and put it under seal.

Mr. HART.—I will ask now that the commissioner take possession of that book to be dealt with hereafter as he sees fit. [342—286]

Mr. HART.—We offer the letter dated Portland, Oregon, 7th May, 1908, addressed to the Eastern Oregon Land Company, and reading as follows:

Portland, Oregon, 7th May, 1908.

Eastern Oregon Land Company,

Vale, Oregon.

Dear Sirs:—

WILLOW CREEK.

Immediately upon receipt of your letter of 2nd inst. on 5th idem, under the head *Malheur Irrigation Company*, we made a search for Mr. H. S. Wallace, the representative of the Federation, and, though we found him, we have been unable until today to hold him long enough in hand to get any infor-

(Testimony of Thomas W. Clagett.)

mation from him.

He reports as you do that certain local land owners are organizing the Willow Creek Water Users Association, that they have agreed as between themselves upon a form of contract to be executed by the individual land owner and the Federation, to the extent of Water for 25,090 acres, and that Deeds are to be placed in the First Bank of Vale for the Beers and McPherson Ranches as a forfeit for failure of the Federation to construct the projected Irrigation System. The point has been reached in the negotiations where the Federation apparently is to get Contracts based upon which there are possibilities of Finance and, on the other hand, the Willow Creek Land Owners are to obtain some sort of a Claim upon the Beers and McPherson Ranches. The latter, we understand, are mortgaged to the Merchants National Bank of Portland to the amount of about \$34,000. The Willow Creek people, in the event of default by the Federation, will be entitled to these lands upon the payment of this debt. They are, therefore, getting a fairly tangible hold upon land which [343—287] according to all reports, is especially suitable for Reservoir Sites. To that extent the land Owners are getting in condition to put in their own Irrigation System if all others fail. But the New Contract between them and the Federation gives the latter one year within which to make progress with their undertaking. We have asked for copies of the Contract and have been promised one for you to-day which we will forward with this

(Testimony of Thomas W. Clagett.)

letter, if we get it, and later if delayed. This Contract will stand a great deal of analysis and, as we read a draft of it which we have before us now, our impression is the Home Office will not agree to encumber any of its lands with the binding conditions it contains. We would not recommend the Home Office to enter into such a Contract even if the prospect was well defined. Such action would operate to exclude your lands from obtaining any Water Right. We have little or no confidence the Federation will be able to raise the money to construct the Irrigation System. It is, of course, quite possible and very probable these Contracts will be turned over to others, at a profit, who will proceed to complete the System. It would be a serious mistake to tie up a large extent of land under any Contract which does not provide adequate security and protection to the land Owner for the completion of the Irrigation System. It is quite possible and perhaps probable that your lands will be excluded from the preferential Right for Water or from any Right for Water if you do not execute this Contract. But, on the other hand, if the System is completed, and you are excluded from any benefit from it, it is reasonably sure the development upon Willow Creek resulting therefrom will cause an enlargement of the project or induce other people to construct additional [344—288] Irrigational facilities whereby your important landed interests will obtain Water for their development. We have asked Mr. Wallace to supply us with a plat of the survey of the Federation

(Testimony of Thomas W. Clagett.)

Ditch. He said the only one he knew of in existence was in the hands of Mr. Grondahl, the Engineer here, under whose direction the Survey was made. We got the impression this gentleman was unwilling to part with the plat of the Survey without payment first for services performed by him to the Federation. We did learn, however, from Mr. Wallace that the line of the Ditch was sufficiently high on the South Bench to bring all your lands upon that side under the System. We are sorry we cannot get you more accurate information of the course of the Ditch than this contains. As to the financial responsibility of the Portland men whose names are connected with the project, while it is true several of them are in a position to put money into it, our belief is none of them will advance much money to the Federation. So far \$10,000 has been contributed since Mr. Nash and his immediate following retired from the Federation. About one-half of this sum has been disbursed in Expenses; Mr. Wallace is busy using up the remainder. They have hopes of getting Messrs. Hartman & Thompson to float an issue of Bonds when the Contracts are completed and the scheme on paper has taken form. It is not improbable they will accomplish something in the way of selling Bonds, since the Merchants National Bank and others have a considerable sum of money tied up in the project. No one, however, can say that it is upon a sound basis. Our belief is the money now being spent is designed to get the Contracts in hand for the purpose of making a Sale to whoever can be found

(Testimony of Thomas W. Clagett.)

to buy the Rights thereunder. The Seattle Syndicate will be in a somewhat [345—289] difficult situation if all the lands in the hands of responsible men upon the Creek are tied up in this Contract for a year. We have heard again from fairly good authority their associates in Chicago have found the money to put their undertaking through to completion. It is rather a singular thing that no one representing the Syndicate has approached you, or ourselves, or the Home Office as far as we know, about your lands. We can only conclude there is a secret understanding between them which will develop sooner or later. Having done all that you possibly could so far we think you are quite at liberty to cease having any further anxiety about the matter. We will be glad, however, to hear from you of any developments of interest for passing on to the Home Office. We think it will be prudent to notify the men who control the Water Users Association that the Home Office is so situated as to be of much assistance, and that it will be well for them not to fill up the 25,000 acres until the Home Office has definitely declined to include their lands.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

Mr. HART.—I now offer in evidence a letter dated May 1st, 1908. It is stamped “Balfour, Guthrie & Co. Copy, Portland, Oregon,” and is addressed to Messrs. Huntington & Wilson, The Dalles, Oregon and reads as follows:

(Testimony of Thomas W. Clagett.)

1st May, 1908.

Messrs. Huntington & Wilson,
The Dalles, Oregon.

Dear Sirs:—

EASTERN OREGON LAND CO.

[346—290]

We were informed last night by Mr. John Rigby, an Engineer who called upon us sometime ago in the interest of Mr. D. M. Brogan who represents the Seattle Syndicate, referred to in our letter to you on the subject of the Malheur Irrigation Company, that all of the necessary finance had been arranged for the construction of an Irrigation System upon Willow Creek. There seems good reason to believe this report at all events as far as a moderate project is concerned.

We were informed recently by the Vale Office that Mr. Leonard Cole, the Vendor to the Seattle Syndicate of certain lands above the Emory Cole Farm, known as Placer Claims, has included in his Contract which is of record in the County Clerk's Office at Vale, certain lands for which Patent has issued to this Company. These latter lands, we expect, will be submerged by the Water stored behind a Dam to be constructed on the Creek. These lands, we further understand, are all supposed to be of Mineral character and particularly those which can be reached by Water have been worked off and on for many years as Hydraulic Mines. We will be obliged if you will advise the Vale Office of the Company what steps should be taken at this time by the Agent

(Testimony of Thomas W. Clagett.)

there to protect the Company's Property Rights (i. e.) whether to notify the Vendee under the Contract of Record, or the Vendor, that the Company has a Patent for the lands and will resist by action at law, or otherwise, any cloud cast upon its title. If there is any further information which you require we will be glad to supply it to you either from here or from Vale.

Yours faithfully,

P. S. The Vale Office has gotten the impression Mr. Leonard Cole intends to stand upon the possession of himself, or his [347—291] immediate predecessors of these lands, for a long period of time based upon a Placer Mining filing. Mr. Cole, however, evades stating the ground of his Claim to the land.

C-SF

C-Vale

Mr. HUNTINGTON.—This is objected to for the reasons heretofore stated and for the further reason that it is a communication—part of a communication between client and attorney.

Mr. HART.—I now offer in evidence a letter dated The Dalles, Oregon May 1st, 1908, addressed to the Eastern Oregon Land Company, Vale, Oregon, signed by Messrs. Huntington & Wilson, and would state that I offer this by courtesy of Mr. Huntington, otherwise I would not have offered it.

(Testimony of Thomas W. Clagett.)

The Dalles, Oregon, May 1, 1908.

Eastern Oregon Land Co.,

Vale, Oregon.

Gentlemen:—

We are in receipt of a letter from Balfour, Guthrie & Co. in which they state that Mr. Leonard Cole has included in the contract to sell certain of the lands of your company upon which Cole claims to have some right by virtue of a placer filing. We understand that your company has a patent to these lands. We suggest that you address a letter to both Mr. Cole and to his vendee calling their attention to the fact that the company has a patent for the lands and that it will assert its right to the land and any attempt to flood the land or otherwise to enter upon it will be met by injunction suit. We understand that this land has not been enclosed or visibly occupied by any one.

Yours very truly,

HUNTINGTON & WILSON.

(Notation on bottom)

21 & 27-14-42

D. M. Brogan. [348—292]

Mr. HUNTINGTON.—Objected to upon the general ground heretofore stated and for the further reason that it is a portion of a communication between attorney and client pertaining to the matters at issue.

Mr. HART.—I now offer in evidence a letter dated Portland, Oregon, 20th April, 1908, addressed to the Eastern Oregon Land Company at Vale,

(Testimony of Thomas W. Clagett.)

signed Balfour, Guthrie & Co. by Mr. Mackenzie, which reads as follows:

Portland, Oregon, 20th April, 1908.

Eastern Oregon Land Co.,
Vale, Oregon.

Dear Sirs:—

WILLOW RIVER LAND & IRRIGATION CO.

We beg to make the following comment upon your advices dated 17th inst., under this head, for the purpose of suggestion to yourselves and also to keep in touch with each other from time to time as new matter develops.

We would judge from the fact the Dam in the Gorge above Cole's which you advise is not to exceed 50 feet in elevation, the scheme of this Company is to create several Units of storage of Water instead of one large Reservoir for the whole Valley, if that were practicable.

At that particular point, with a fall of 50 feet to the mile, the Water will back up a distance of about a mile before running over the Dam. We do not know the width of the Gorge for that distance but, assuming it to be 200 feet on the average, the capacity of the Reservoir would be too small to justify its construction and the additional expense connected with the Project. It will be interesting to learn the character of construction of the Dam; it will be concrete we suppose. [349—293]

The Dam site appears to be situated in the North East Quarter of the South West Quarter of Section 2-15-42. The backed up Water would not reach

(Testimony of Thomas W. Clagett.)

Section 27, which you own, but is involved in the adverse Claim of Mr. Leonard Cole. We would assume, besides, the Water would not back up to the Placer Claims. In that event perhaps these claims would be worked for their Mineral value. On the other hand, our assumption the Water would not back up more than a mile may be a mistake but we think not. Our impression is you will hear more of the Mineral value of the lands claimed by Cole later on.

A union of the Federation interests with those of the Malheur Irrigation Company and a transfer of the combined projects to this new Company would complete the outline of a scheme of general Irrigation for the Lower Willow Creek Valley, and the Bench Lands, especially if Water from beyond Willow Creek Water Shed can be brought into it by way of supplement.

Referring to the plat upon which you show the tortuous line of the main canal on the South side of the Creek, we would think because in its course it cuts up your Section 15 pretty badly, in appearance at least, because it enters your Sections 21, 33 and a part of 27, to say nothing about the effect of the Dam on your Section 11, you should be in a pretty fair position to hold Mr. Brogan pretty well in hand when he finally comes to you for Right of Way. We presume the Cow Valley lands will also be involved.

We see nothing to be done excepting to keep as

(Testimony of Thomas W. Clagett.)

closely in touch with Mr. Cole and Mr. Brogan as possible.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

W. MACKENZIE. [350—294]

Mr. HART.—I hand you herewith a bunch of letters, I presume, in order. They correspond with the letters contained in the letter book which counsel refused to permit us to examine—they cover the same period—We would claim the right to inspect them and use such of them as we feel tends to produce the truth pertaining to the issues involved, and as being letters and declarations from the Home Office at Portland, or the Home Office in San Francisco of the complainant company to one or the other and addressed to the office at Vale, Oregon, in answer to the communications from Vale, Oregon, and would ask that they be held by you subject to further order of yourself or the further order of the court.

Mr. HUNTINGTON.—We make the same objection and the same statement with respect to them as we did with the letter-book—from and after July 11th, 1908.

At the hour of 6:15 o'clock P. M., adjournment taken until 9:00 o'clock A. M., July 24th, 1909.

At the hour of 9:00 o'clock A. M. July 24th, 1909, met pursuant to adjournment as above. Present: Same as before.

Mr. HART.—I offer in evidence a letter dated Portland, Oregon, 4th April, 1908, addressed to Eastern Oregon Land Company, Vale, Oregon, and

(Testimony of Thomas W. Clagett.)

signed by Balfour, Guthrie & Company by Mr. Mackenzie, which reads as follows:

Mr. HUNTINGTON.—This is subject to our former objection. [351—295]

Portland, Oregon, 4th April, 1908.

Eastern Oregon Land Co.,

Vale, Oregon.

Dear Sirs:—

MALHEUR IRRIGATION COMPANY.

We have received your letter of the 1st inst. from which it appears another stage in the development of Willow Creek Irrigation is on.

It is, of course, idle to expect much or anything to grow directly out of the declarations of purpose of the Federation. You must bear in mind, however, that organization professes to own the Beers and the MacPherson Reservoir Sites. If these pass to the Lower Willow Creek Irrigation Co. and are combined with Contracts to take water from the individual land owners a basis for Finance of an Irrigation Project will be reached.

These Reservoir Sites, we think, are really the most important factors in any Project for the Valley and Bench Lands together. The Gorge above Coles is narrow, and the Creek is of torrential character. We do not believe there is capacity there, unless at great expense for dam construction and for submergence of land for a considerable distance back of it, for more than a few thousand acres.

The next development we would expect, if the Seattle people are really backed by Capital, is to see

(Testimony of Thomas W. Claggett.)

them unite with the Lower Willow Creek Co. provided the latter get the Reservoir Sites and turn these over with the Contracts for Water to the former.

The question then would be the extent of the project these united interests would undertake. If merely the Creek lands and the neighboring partially developed lands, such as Scott's, *you own* lands would be left out also the [352—296] other bench lands.

Your policy, therefore, we think should be to keep in close touch with what is going on from day to day. We do not think any project can condemn all the land you own in the Gorge above Cole's for Reservoir purposes and all the Right of Way over your Bench Lands unless the length of the Ditch is to be much greater than our impressions indicate it will be. You will remember the Statute fixes the area of land condemnable for such purposes from one owner by relation to the length of the Ditch.

Yours lands in the Gorge are probably of Mineral character to some extent. Any condemnation proceedings would no doubt be met by you with a claim for compensation on that basis. Probably you can gather more or less information respecting the likelihood of any project now under consideration covering your lands there.

The Home Office does not want to put any money into any Irrigation Project unless it becomes absolutely necessary to do so to get Water for some or all of its lands under a projected Ditch. If the Finance is provided for a project which will exclude your

(Testimony of Thomas W. Clagett.)

lands for the time being, it may be the second or next stage of development will provide as good an opportunity though, of course, at first sight it would seem as if your participation in a first project would be likely to give you Water at a lower price than by remaining out entirely and coming forward as a purchaser for your requirements later at the going price then.

The Home Office is kept informed of your advices and we think will communicate promptly when a definite question is presented for decision.

We suggest you take the ground with Mr. Scott you [353—297] want to be considered in on any plans he and his associates may mature subject of course to the approval of the Home Office.

We would think you would be fully justified in putting yourself in the same attitude with the Seattle people.

We have had the same idea as you have that the Home Office might do worse than to take some interest in lands on the Creek which now possess Water Rights, since the construction of an Irrigation System for the Valley will induce the closer settlement and higher development of the naturally moist lands, and there would be prospects of a good profit. We cannot see, however, that the lower lying lands would be likely to yield a relatively greater profit at the present cost than the Bench Lands would bring were the same amount of money invested in Water Rights and Improvements. We would not recommend an investment in the former unless it would enable you to get into a position of

some influence in the development of the Irrigation Company in control of the Valley. We need not caution you against the undesirability of becoming involved in any way with these various parties and factions. Unless business can be done with a sense of safety and confidence in the people you are asked to work with it had better be avoided.

Yours faithfully,

BALFOUR, GUTHRIE & CO.
W. MACKENZIE.

Mr. HART.—I offer in evidence letter dated Portland, Oregon, 10th January, 1908, addressed to Eastern Oregon Land Company at Vale, Oregon, and signed by Balfour, Guthrie & Co., Mr. *Mackenzi* reading as follows: [354—298]

Mr. HUNTINGTON.—This is subject to our former objection.

Portland, Oregon, 10th January, 1908.
Eastern Oregon Land Co.,
Vale, Oregon.

Dear Sirs:—

WILLOW CREEK.

In reading your favor of 6th inst. we get the impression you are somewhat sensitive to comment from us which may be construed to mean we are of a different opinion to yourselves upon the various more or less difficult questions which so far have come up under this head.

For our own part we have no pride of opinion on questions of Irrigation or Water Law, or of Irrigation Engineering, as we have little or no knowledge

(Testimony of Thomas W. Clagett.)

of these somewhat difficult professions, and we quite believe you would take precisely the same view if we were discussing these matters in person. It is necessary that there should be a good deal of give and take of opinion before anything can be accomplished. We are therefore now going to clear the ground, as it were, against the future and to the end that we will have a thorough understanding.

In saying in our letter of 31st ulto. to you that we reserved our opinion whether or not under the Oregon Laws all the lands within the boundaries of an Irrigation District could be subjected to all the burdens regardless of the attitude of the owners who dissented, we did not intend to take issue with any one who held the affirmative view. The question would depend upon facts of which we have no intimate but only a little knowledge and of course upon the view the Supreme Court would take.

But of course it is a very important matter to [355—299] come to a decision over, if the Irrigation District is to be organized,—

These lands would, practically, all be involved, if the affirmative view is correct, which would be a serious matter for your interests, unless the project and its management were safe.

We could not make any progress with the proper consideration of the question until the data of the organization was in our hands in due form for presentation to the Home Office and to lawyers.

The mere *intention* to organize under the Statute, and the plan of construction of Reservoirs and Can-

(Testimony of Thomas W. Clagett.)

als, the Estimates of Cost of the execution of these plans, and the design of the finance, which had been discussed but probably not put into writing in a formal way, could not fulfill the requirements of the position of Agents in putting forward a project to the Directors at the Home Office for approval. Every feature involving responsibility and liability should be in due form. This we are quite sure you understand and we state the fact only to make a clear record for the future.

In their present state your lands in this district are practically only *nominally* valuable. An Irrigation undertaking will make them very valuable if precaution is taken to bring them in or to keep them out as the shrewdest policy will dictate. We could not therefore take a more definite position with you than we did as being *Agents* we can only act in a matter of this kind upon express instructions. Our feeling was, and is, that if the promoters of the Irrigation District were earnest in their intentions they should take prompt action about the stability of their Water Rights, about Reservoir Sites, and about Rights of Way. The [356—300] action of the Syndicate indicates its intention is to seize every valuable thing which will inure to the success of the project. That of course implies every advantage gained would cost money to the subsequently developed Water Users. It is for them, it seems to us, to act for their own protection. They might later waive present acquired rights in return for suitable future benefits. It is true the Home Office being a

(Testimony of Thomas W. Clagett.)

large land-owner is equally interested in taking steps with local land owners to get protection, but situated remotely from the field of interest there is no way that we know of to awaken them to activity excepting to bring them to a realization by presentation of facts that their interests are threatened by intending monopolists. In giving you authority to contribute to the expense of preliminary work all has been done by them so far that they have been called upon to do. It remains for your colleagues and yourselves to get your minds to an agreement of what shall be done for the best interests of all. We will undertake when a definite project is worked out on paper to get the Officers on the ground for careful investigation and decision. In the meantime we are fully alive to the responsibility in a sense this places upon you but we are in no sense fearful you will fail in sound judgment or in any other way. We do not wish you to feel over-burdened by the difficulties connected with Willow Creek development promoted by the slow acting and possibly uncongenial people in that region. If you stir them up to realize they run the risk of being misled by the Options taken by the Seattle Syndicate, which may never be exercised, you will be doing, we think, good work for them and for yourselves. That the local people owning on the Creek should be [357—301] indifferent about going on with the organization of the District because they will not be interested if the Options are exercised is in our opinion courting the danger of being taken in a trap. This view is based on our

(Testimony of Thomas W. Clagett.)

inference the project of the Syndicate is for about 10000 acres maximum. There seems no object for a Storage system to buy the 7000 Riparian Lands at from \$35.00 to \$50.00 per acre. There are enough Bench Lands to be had at a low price, possibly under the Carey Act, to use up all the indicated capacity. Of course if you cannot move these people to act, or if our views as herein expressed are erroneous, nothing further meantime can or need be done. We would like you to write us when you find it convenient with absolute frankness as to your own conclusions and in reply to all we have said at any time. We will put every idea which comes out into the common fund of knowledge and opinion and do the best we can with it all in the interest of our mutual principals. Our belief is, if the Syndicate bona fide intends to construct an Irrigation System, that we can do no more with them when the time comes for close contact by exhibiting a capacity to defend your interest before the negotiations come up in fact, then by an attitude of waiting to see the details of their plans before taking any action, which may then be somewhat late.

We have not yet heard from Mr. Brogan direct but we have received a hint from an Engineer who visited Willow Creek with him, whom we met incidentally, that he intends to consult us as soon as the work of getting the Options shaped up is completed. Our impression is a Reservoir cannot be constructed in the Canyon immediately above Cole's without submerging some of your lands. We suppose [358—

(Testimony of Thomas W. Clagett.)

302] these can be condemned but we believe there is a limit to the area which can be taken from one owner.

Yours faithfully,
BALFOUR, GUTHRIE & CO.

W. MACKENZIE.

Mr. HART.—I now offer in evidence a letter written at Portland, Oregon, December 31st, 1907, addressed to Eastern Oregon Land Company at Vale, Oregon, and signed by Balfour, Guthrie & Co. by Mr. Mackenzie, which reads as follows:

Mr. HUNTINGTON.—This is subject to our former objection.

Portland, Oregon, 31st December 1907.
Eastern Oregon Land Co.,
Vale, Oregon.

Dear Sirs:—

WILLOW CREEK.

When we stated in our letter of 23d inst. to the *Home Office*, upon which you comment in your letters of 26th and 27th idem, that the movement among the Settlers was "*a more or less indefinite purpose*" it was far from any thought of ours to cast any reflections upon the steps which had been taken by them and we merely adopted that form of expression as the one which most accurately conveyed the understanding the actual state of affairs which we had derived from your letter advices.

We now take note that the movement is "*in furtherance of a project formulated, positive and decisive.*"

(Testimony of Thomas W. Clagett.)

This information is more than interesting and we will take pleasure in passing it on to the Home Office where henceforward a close interest will no doubt be taken in the [359—303] progress of the project as reported by you from time to time since, on the one hand, if they join the movement in a manner which will bind your lands they will be materially interested and, upon the other, if they do not put the lands into the project they would nevertheless be vitally concerned in the success of the project.

No doubt as you see the plans of the Settlers to form an *Irrigation District* under the *Oregon Law* gradually unfolded you will put us in a position to advise the *Home Office* of the details also in what manner and to what extent your own lands are or will be likely to become involved. The greatest care must be observed that directly or indirectly no actual binding responsibility of the lands to the project is assumed until authority is first received from the *Home Office*; and we feel quite easy that you will keep this before your mind.

In the meantime the *Home Office* authorizes you to contribute as called for in connection with the preliminary work of the project one cent per acre of your lands to be benefitted by the project. We are not advised to discourage you from taking an active part in the *Committee* and *other* work and we believe the Home Office approves of your doing so but we think it well to bear in mind that the Settlers must not assume from your activity in the project your lands are thereby committed to it by consent, or from

(Testimony of Thomas W. Clagett.)

their legal Advisers that the Irrigation District will obtain control of all your lands within its limits when once it is organized and running under the Statutes. The Home Office has always favored the idea of encouraging and assisting any well conceived and properly financed development undertaking but it reserves, of course as you will readily understand, the [360—304] right to refuse to join in any quasi private scheme or in any public one, such as is now under consideration, until it has had spread out before it the whole project in detail and the inducement is sufficient to go into it. We have no doubt the idea has been given out by the legal Advisers of the Settlers that the Statutes in one way or another can bring into an *Irrigation District* all the lands within its limits and subject these lands to the burden of a lien for the cost of construction of the *Irrigation Works*. We will not assume to say whether or not this will be found when tested to be the law of Oregon. We know that the Wright Irrigation District Law of California was declared not to be binding upon lands there the owners of which resisted the enforcement of Liens intended to be made effective upon private property without the owners consent by legislative enactment. It must be clearly kept in view that a State Statute can only be held to be good when it is not in conflict with the paramount laws and when it is regular in all other respects.

As far as we have knowledge of the various mooted undertakings for development of the valley we do not see any one which appears to be shaping for the

(Testimony of Thomas W. Clagett.)

maximum of possible control of Land and Water excepting the *Seattle Syndicate*. It remains to be seen what is its real purpose. If in the main hostile to the *Bench Land Owners* they must move for their own protection, and though we see difficulties in their way, nevertheless, we do not know of any method of restraining the Syndicate more completely than through a union of the local interests in the form of an Irrigation District.

But the *District* cannot hold the *Syndicate* in check if it is not in possession of *Water Rights*, or *Rights of Way* and *Reservoir Sites*. It is all very well to say these [361—305] can be condemned under the law. The money must be available for the acquirement of the necessary lands, and for construction of the works, and for all the purposes before the campaign of condemnation is commenced. If we are correct in assuming that the formulated project, positive and decisive, contemplates supplying only the lands now without *Water Rights*, we see in the outlook only a *Flooded Water Storage* system, for the condemnation of all the *Vested Rights* in the *Valley* would undoubtedly be impracticable. That a *Storage* system is *practicable* we have no doubt if *Cow Valley* is embraced in the project as a *Reservoir* point, provided the finance can be arranged, but, of course, we have little knowledge of the difficulties. That is the most important consideration of all after the project is shown by competent Engineering talent to be feasible in point of *Water supply*, of cost of *Reservoirs* and *Canals*, and

(Testimony of Thomas W. Clagett.)

the rights of others have been harmonized with the District. We would encourage the Settlers by all means to go ahead with their plans and especially to seize the Water and the strategic points for Reservoirs and for carrying Canals over, across, or round natural obstacles, provided you see to it they do not fix *legal record* holds upon your own lands. Being friendly to them you can defer action of this kind. If they cannot do any better they could dispose of these Rights to parties later on who would give proper guarantees for construction of a system. We trust we are making it clear that in our opinion the only ones who should be permitted to control the Water and the business of Irrigating land in the Valley are the present Owners themselves, leaving, however, an opening in the plan of organization for the Sale of Rights and of Land as now held and owned to other Owners who may follow. [362—306]

In considering an *Irrigation District* organization, while it may be pretty much a life or death matter for the Homesteader to succeed, and therefore it should be practicable, the largest question of all is where is the money to come from. One hears of plans to issue Bonds whereby it would be raised, but there is no evidence any responsible people have said they would buy or underwrite an *Irrigation District* issue. It may be bonds of this class will come into favor as the outcome of the existing distrust of Railway and Other Bonds. We know, however, Irrigation Bonds have hitherto been difficult to place. We

(Testimony of Thomas W. Clagett.)

would be indisposed ourselves to take any of such an issue as this enterprise would put on the market unless all of the features of the security were past any peradventure of a doubt; and we think that would be the attitude of all conservative investors. We would not discourage the movement on that account. One rarely knows what a day may bring about in the way of a change.

When you can give us some light upon the detail of the project we will be glad to hear from you. If you can put the data in the form of a Prospectus it will be clearer than in general description.

We will write you again soon in reply to certain points to which you call our attention.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

W. MACKENZIE.

Mr. HART.—I offer a letter in evidence written at Portland, Oregon, January 6th, 1908, addressed to Eastern Oregon Land Company at Vale, Oregon, and signed Balfour, Guthrie & Co., by Mr. Mackenzie, and reading as follows: [363—307]

Mr. HUNTINGTON.—This is subject to our former objection.

Portland, Oregon, 6th January, 1908.

Eastern Oregon Land Co.,

Vale, Oregon.

Dear Sir:—

WILLOW CREEK.

Every new development is of interest; and your last report under date 1st inst. of your talk with

(Testimony of Thomas W. Clagett.)

Mr. Emory Cole is especially so, even if it is well to take everything he says with precautionary reserve.

The important fact must be kept in mind that if the Seattle Syndicate obtains control of the basin above Cole's and of the strategic points along the Creek by purchase, they will probably have the Bench Land Owners at a serious disadvantage. The latter must anticipate their obtaining this control. They should insist in a forceful way upon a declaration by the Syndicate of their plans. If no satisfaction is obtained, then action should be taken with the assistance of skilled lawyers and engineers to prevent the Syndicate from getting detrimental control. Your own position is the same as that of the individual Bench Land Owners. Your lands will be deferred in their development if some way of bringing Water to them is not opened up before the Syndicate has procured the control the methods they employ indicate. It appears to us there is only one adequate economic way to provide Water for these lands and that is one System created with sufficient capacity to cover all the lands. Possibly, as we have already suggested, Cow Valley can be utilized as a Storage basin and Upper Willow Creek and the Syndicate's Canal to a point below Cole's under the Common Carrier principle for bringing Water to the Bench Lands. The Irrigation District Scheme also has some merit in it if the finance is practicable, but the Water itself and the Storage [364—308] Reservoirs and Rights of Way above and immediately about Cole's will be difficult to get and probably ex-

(Testimony of Thomas W. Clagett.)

pensive if a contest will come up with the Syndicate.

Your own lands in the Basin above Cole's must be kept well before your minds. We believe one Section, or part of one at least, is Mineralized, and if the Syndicate plans to condemn the tract as a Reservoir Site some evidence must be obtained when convenient of its exact position with respect to the lands under Option there to the Syndicate at a price which suggests the Sale is on basis of Mineral value, principally.

It is idle to speculate upon the purposes and plans of the Syndicate with your interests, possibly, at serious risk. We have written to Mr. Brogan asking if he cares to make a declaration. If we do not hear from him we intend to ask you to prepare a brief statement of the various existing Canals showing the area served, of the various projects before the people, of the extent of the Valley Lands, and approximately of the Uplands situated so as to be under a practicable system of Canals, and of the attitude of the people for presentation to the Home Office first and thereafter with their authority to the best Irrigation Law Attorney we can find in the State for his opinion and advice.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

W. MACKENZIE.

Mr. HART.—Then I offer in evidence a letter (copy) which is stamped at the top apparently by a rubber stamp "Balfour, Guthrie & Co., Copy, Portland, Oregon," dated 23d December, 1906, and

(Testimony of Thomas W. Clagett.)

addressed to Eastern Oregon Land Company, San Francisco, [365—309] California. It doesn't show who it was signed by. This is one of the letters Mr. Clagett has furnished me yesterday which isn't signed. The letter reads as follows:

Mr. HUNTINGTON.—Objected to as not proper cross-examination—the same objection and the further objection that it is incompetent, secondary and not the best evidence.

23rd December, 1907.

Eastern Oregon Land Co.,

San Francisco, Cal.

Dear Sirs:—

WILLOW CREEK.

We enclose herewith copy of a letter from the Vale Office, dated 19th inst., which we suggest you examine carefully and let us know your views upon same and upon our own remarks which follow for the guidance of Mr. Clagett.

The situation there appears to be as follows, (viz.):

First. The flow of water is inadequate in the Irrigation season to permit of the working of all the Riparian Lands and in consequence the available supply is taken by those of them who made due appropriation long ago and have since continued to use the Water thereunder.

There is a question whether or not lands which you and others own abutting on the Creek have lost their right to take and use Water from it during the normal flow stage by reason of neglect to establish

(Testimony of Thomas W. Clagett.)

a record right, and of failure to use. And there is also a question whether or not Water diverted upon Riparian Lands and carried beyond these to Non-Riparian Lands continually for say ten years can now be disturbed in its use on Non-Riparian Lands.

These questions can only be answered to your satisfaction [366—310] upon the facts as to the Recorded Water Rights and as to use being ascertained, submitted, and duly considered by an Attorney experienced in the practice of the law applicable to Water Rights.

Second. The outlook for Irrigation development of the lands along the Creek which are destitute of Water Rights and of the Bench Lands depends entirely upon the *storage of Flood Water* upon the Upper Creek, in Cow Valley through construction of a Canal connecting a Reservoir there with Upper Willow Creek a mile or two east of Ironside Post Office, and of connecting the El Dorado Ditch which derives Water from the Burnt River Watershed with the Upper Willow Creek Reservoirs. Subsidiary Storage Basins also may be constructed in the Uplands upon both sides of the Lower Creek. The cost of a system of this kind will be very large, possibly prohibitive, because of the difficulty in financing the construction, which as a rule is greater in a more or less remote section of country like Willow Creek than in a more densely populated country supplied with convenient Railway facilities and near to market. But if the capacity of the Reservoirs and the supply of Water is sufficient to include

(Testimony of Thomas W. Clagett.)

within the scope of the undertaking the Dead Ox Falt country we would think it likely the average cost of Water Rights per acre would be brought within the bounds of moderation.

There are no existing organized Companies on Upper or Lower Willow Creek basing their Rights to Water upon the principle of a *Public Use*. The Water Users in some instances take their supply as individuals and in others in the form of co-operative unorganized bodies. These Rights doubtless when tried out will prove in the main to be well established. [367—311]

There are several claimants to Water Rights, however, who have organized and who assert a bona fide intention to construct a Flood or Storage System of Irrigation upon lines which in process of time would probably give to one, or more, or all the Statutory and other Rights which make a Public Use System. These as far as we are advised are,—

The Co-operative Federation

The Malheur Irrigation Company

The Lower Willow Creek Irrigation Company

—and it appears further from the Vale Office letter quoted herein that about 40 owners of land in the Valley desire to organize into an Irrigation District with a more or less indefinite purpose in view, but which may be assumed to be in the nature of self-protection; also that some of the Bench Land Owners have made filings to the extent of 16,000 miner's inches of the Flood Waters of Willow Creek, actuated probably by the same apprehensions as the

(Testimony of Thomas W. Clagett.)

strictly Valley land owners.

No close judgment can be formed as to the bearing these movements may have on your interests until some kind of a project is formulated and competent responsible people become identified with it.

The alarm to all parties owning undeveloped lands has come from the action taken by the Seattle, or so-called, Klondyke Syndicate. If these parties have Hydraulic Gold Mining as their main object and they acquire the Ownership of the Riparian Lands which control the Water it is probable, though of course not certain, the Bench or Uplands are not likely to be developed soon by Irrigation and the Valley Lands without Water now will only be supplied under burdensome conditions. That view is based, however, on the assumption the project is *not* to be made large enough to meet the Mining [368—312] and irrigation requirements together. It may be stated the High-lying Grazing Lands on both sides of the Valley would be of comparatively small rental value if the Valley Lands are not kept in use producing hay.

Third.—The conflicting interests of the parties who are interested in promoting Companies for the Sale of Water, or for Mining purposes with those of Owners of the Land who have no Water Rights makes it quite clear that immediate aggressive action by the latter is imperative.

The Seattle Syndicate, whatever their real purpose is, have shown by their methods they intend to fortify themselves against action by the land-owners

(Testimony of Thomas W. Clagett.)

before they announce their purposes. As against this it would seem advisable for the latter to take steps for their own protection.

The proposed Irrigation District we infer is to organize under some provision of the State Law whereby the land to be benefitted may be used as security for money to be employed in construction of an Irrigation system. We have grave doubt as to the existence of any authority of law in this State for the formation of such an Irrigation District or of any authority of law under which Capital could safely be invested in Bonds of such an Irrigation District. This point, however, is susceptible of demonstration by competent reliable Attorneys and in our opinion the first steps the local land-owners should take is to look into this feature before going a step further. Then, again, there is the question of whether or not there is left enough unappropriated Storm Water to Irrigate the lands owned by the parties desiring to create the Irrigation District. It would seem to us the next step which these land-owners should take is to band themselves together to refuse to take any water from anyone, thereby making it [369—313] impossible for the companies seeking to supply them to do any business which would cause the lapse of their rights; and when that stage is reached to acquire the Water Rights themselves for development by themselves or to sell to parties who would agree to give them Water at a reasonable cost. If such control can be acquired of the Water under advice of a competent

(Testimony of Thomas W. Clagett.)

Engineer we have no doubt the Mining Company, if that is the real character of the Seattle Syndicate, can be obliged to carry Water through its main Canal and Storage Basin above Cole's at a fair cost to the Bench Land Owners. We think there is a provision of the Oregon Law which makes all Canal Owners Common Carriers.

In our opinion it would be quite inadvisable for the Vale Office to encourage the local land-owners you will join any scheme for the supplying of water which they may formulate until the Legal and Engineering features are made perfectly clear it would be prudent for you to do so. Nevertheless we think Mr. Clagett after making that announcement should agree to serve upon the Local Committee and do all he can to advance the Land-owners' side of the problem. The cost of preliminary Legal and Engineering work limited to one cent per acre on the lands to be directly benefitted is light. We would recommend Mr. Clagett should be authorized to come under obligation to make this contribution.

We strongly recommend that no time should be lost by the local land-owners in determining their position under the law as to the Water Rights possible of being acquired and as to the Engineering features. Nothing but forceful aggressive action at this time will develop the purposes of those who are moving to obtain rights which we presume would control the whole Valley. The Committee consisting of [370—314] Weaver, Cleveland and Clagett should at once collect the first assessment

(Testimony of Thomas W. Clagett.)

of the working fund and proceed to employ a lawyer and an engineer. If the Seattle Syndicate have any purpose hostile to the local land-owners they will declare themselves in one way or another. If they should come to you for your lands you will be free to deal with them. In case you elect to abstain from taking any action at all now it does not follow you have no remedy against deprivation of opportunity to develop your lands if you decide to do so sooner or later. Mr. Clagett's view that you have no defined Water Rights in connection with your Willow Creek lands means, we think, at the normal flow. We suppose as Riparian owners of several tracts you have certain legal rights which could be asserted against the monopoly of the flood Waters or any reduction of the flow for Mining purposes. The idea that the Seattle Syndicate can accomplish a complete absorption of the Water through purchase of the Riparian Lands having definite Water Rights we think is a mistake. The control of the Water and Reservoir Sites jointly with an extensive area of lands waiting Irrigation development can force the Syndicate to carry water through the Canyon above Coles and over the strategic lands below upon payment of a reasonable consideration for the service. Probably it will be well not to declare knowledge of the Common Carrier feature until the proper time for so doing arrives.

We think Mr. Clagett's queries as to the timeliness of the movement, and of the form of binding the lands for the cost of constructing a Canal will come

(Testimony of Thomas W. Clagett.)

up at a more appropriate time after the project of the local land-owners is formulated. With a united body of local land-owners under intelligent leadership the Seattle Syndicate cannot do much [371—315] injury. The sooner the issue is sharply drawn the better.

One step which may be advisable at the instance of the local land-owners is to get an Option of purchase on the Beers and McPherson Ranches on Upper Willow Creek if Engineers say these are logical Reservoir Sites. As it looks now the Federation may not complete that purchase though they have a considerable sum of money locked up in these properties.

This letter is in duplicate for you and the Vale Office.

Yours faithfully,

Mr. HART.—Then I offer a letter in evidence dated December 17th, 1907, at Portland, Oregon, addressed to Eastern Oregon Land Company at Vale, signed Balfour, Guthrie & Co. by Mr. Mackenzie, reading as follows:

Mr. HUNTINGTON.—This is subject to our former objection.

Portland, Oregon, 17th December 1907.
Eastern Oregon Land Co.,
Vale, Oregon.

Dear Sirs:—

WILLOW CREEK.

Referring to yours of 12th inst. from Ontario ad-

(Testimony of Thomas W. Clagett.)

vising that you have learned the Seattle Syndicate has taken Options upon detached Riparian Lands aggregating about 7000 acres, we suggest that you keep as close a watch as possible upon their operations, and particularly, try to get with certainty the names of the Grantee of these Options and final date of their exercise. This seems to us important because if their real purpose is to control the Water and its [372—316] use is to be mainly for Hydraulic Mining the outlook does not appear bright for Irrigation development of your Bench Lands. The sooner you can get reliable information the better. The first best use to put it to we would think will be to address a pointed enquiry to the holders of these Options as to their purpose. If a satisfactory response cannot be obtained we think it may become necessary to organize the Bench Owners and the present Water Users who have not sold to resist the monopoly of the main flow of the Creek. It seems to us advisable to set matters in motion at once to bring them to us rather than to remain still until all their plans are made and our opportunity has disappeared.

Yours faithfully,

BALFOUR, GUTHRIE & CO.

W. MACKENZIE.

Mr. HART.—Then I offer in evidence a letter dated November 26th, 1907 at Portland, Oregon addressed to Thomas W. Clagett, Esquire, at Vale, Oregon, signed Balfour Guthrie & Co by Mr. Mackenzie.

(Testimony of Thomas W. Clagett.)

Mr. HUNTINGTON.—This is subject to our former objection

Portland, Oregon, 26th November 1907.

Thomas W. Clagett, Esq.,
Vale, Oregon.

Dear Sir:—

The information which has come to me respecting the new interest located at the head of Willow Creek suggests you should keep a very close watch upon what is going on to determine the main purpose behind the movement. When I visited [373—317] the place in the spring of this year I was more impressed with the idea that a large Placer development undertaking was contemplated than that Irrigation was the principal part of the project. It seemed, of course, possible that both of these features were equally important. The purchase of the land at that point and the impression which you have received that riparian lands along the creek are to be acquired strikes us as important indications in support of our original view. If auriferous lands exist above Coles, which have been worked off and on and for many years, it would seem not an unreasonable deduction that the Stream has carried Gold down along its course through the Valley and that it now exists on the bed rock below Coles though perhaps too deep considering the difficulty of hydraulic work to result in much profit. I have no great knowledge of development work of this kind, but I have the impression that there is some likelihood there is something in the idea that the

(Testimony of Thomas W. Clagett.)

Lower Valley is of much interest from the Placer Mining standpoint. I merely suggest this that you may keep it before your mind in the watch that you will keep of all that these people will do. I suggest that it may be advisable for the Company to purchase some lands abutting upon the Creek to enable them to exercise more influence than they now possess in the settlement which must come sooner or later in connection with the lands they now own on the Creek, if a large undertaking is to be established either of Placer Mining, or Irrigation there. You might keep a lookout for a suitable property and take your own means of ascertaining the price and terms upon which it could be purchased. Of course any movement to buy land in the name of the Company would be indiscreet and anything you do you had better arrange [374—318] through another channel.

Yours faithfully,

BALFOUR, GUTHRIE & CO.
W. MACKENZIE.

(Endorsed on back: "Marked Personal L.")

Mr. HART.—Q. The gentleman, Mr. Mackenzie, who signed these letters, he is the General Agent of the Company living at Portland, isn't he?

A. No, sir, Balfour, Guthrie & Company are the general agents for the company. Mr. Mackenzie is the head of the land and loan department which has the oversight of this field.

Q. Of the Company's properties?

A. Yes, sir, of the Company's properties.

(Testimony of Thomas W. Clagett.)

Q. And Mr. Mackenzie is in charge of that matter?

Mr. HUNTINGTON.—This is subject to our former objection.

A. He is.

Q. He is the gentleman who has been in attendance upon this hearing at the present time?

A. Yes, sir.

Q. The Mr. Martin, the President of the Eastern Oregon Land Company is the gentleman who has also been present here at the hearing?

A. He has been.

Q. He maintains an office in the City of San Francisco, does he? A. He does.

Q. Is that the head office of the Company?

A. It is. [375—319]

Q. And when mention is made in transmitting news backward and forward to the "Home Office" it means the San Francisco office?

A. The San Francisco office is spoken of always as the "Home Office."

Q. San Francisco office is always spoken of as the "Home Office"? A. Yes, sir.

Q. Now, you reported to your company, didn't you, the extent of the work being done up there by Mr. Brogan or the defendant company?

A. Do you mean letters?

Q. What was the date when you first reported to them that the defendant company was engaged in the construction of that dam?

A. I cannot remember the date, but it would be

(Testimony of Thomas W. Clagett.)

along in the spring of 1908, probably in the month of April that I reported that it was reported work was being done in the canyon.

Q. On the dam? A. On the dam, yes, sir.

Q. It seems like from these letters that you knew that work was being done or contemplated and money expended as early as the spring of 1907?

A. 1907? No, sir, 1908.

Q. I call your attention—1908—you wrote numerous letters about it during January and December and November—January and February, 1908, and November and December, 1907?

A. You said the spring of 1907. I was not here in the spring of 1907.

Q. What time did you get here? [376—320]

A. I came here in the month of June, 1907, and went away and came back in December.

Q. You learned it in the fall and winter of 1907?

A. I knew nothing about it in the fall and winter of 1907.

Q. How do you explain the letters about it?

A. There is nothing in the letters that will indicate anything was begun upon the dam or that I knew of any construction upon the dam in the fall of 1907—'08.

Q. You knew that preliminary work was being done in the Valley, and when that work was being *doen*, that the Seattle parties were engaged in expending money and doing preliminary work acquiring property and doing preliminary work?

A. I knew parties had taken options in the

(Testimony of Thomas W. Clagett.)

Willow Creek Valley late in the fall of 1907, or I wish rather to say in the winter of 1907.

Q. You received this letter from Mr. Mackenzie, the letter I speak of is one marked "14" and dated November 26th, 1907? A. Undoubtedly.

Q. When you received that you were informed of the contents—this portion of it which reads "When I visited the place in the spring of this year," that would be 1907? A. Yes, sir.

Q. "I was more impressed with the idea that a large placer development undertaking was contemplated than that irrigation was the principal part of the project." At that time you understood what he had reference to, didn't you, when you read that?

A. I did.

Q. And in that letter you were told to buy some property up the Valley so you could stop anybody from coming along—

A. I have not read the letter; I don't remember the contents of [377—321] the letter at all.

Q. You did receive many advices to put yourself in the way to prevent either this company or any other company from going on with irrigation works, didn't you?

Mr. HUNTINGTON.—Objected to as not proper cross-examination—not the proper method of cross-examining this witness upon that particular subject as incompetent; irrelevant and immaterial.

A. I did not. It has always been stated to me by the Officers, Managers of the Company that they were entirely in sympathy with any legitimate de-

(Testimony of Thomas W. Clagett.)

velopment in the way of irrigation of Willow Creek Valley. It has always been our effort to take care of the interests entrusted to us, and our effort has been directed in seeing that nothing was done which would be detrimental to the development of the Valley. We have never intended to oppose any legitimate development of the Valley as the question indicates.

Q. I call your attention—I will first ask that his explanation BE STRICKEN OUT AS NOT ANSWERING AND IMPROPER. I will call your attention to a letter dated April 4th, 1908, and which reads as follows: “We suggest you take the ground with Mr. Scott you want to be considered in on any plans he and his associates may mature subject, of course, to the approval of the Home Office.” “We think you would be fully justified in putting yourself in the same attitude with the Seattle people.” In other words, you were told to make a deal with Mr. Scott to keep him going, and also do the same with the Seattle people and double cross him?

A. I don't understand it that way at all. [378—322]

Q. You understand the English language, don't you? A. Why, a little.

Mr. HART.—I wish at this time to give notice to counsel that all of the letters which have been produced here and which we have examined, as well as those which counsel has refused to permit us to examine, we wish to copy them and to use them as

(Testimony of Thomas W. Clagett.)

part of the evidence, such of them as we see fit and deem proper as part of the evidence in chief on behalf of the defendant company.

Mr. HUNTINGTON.—We move to strike out all of the evidence of this witness upon cross-examination relating to the correspondence between his office—the office of this witness and Balfour, Guthrie & Company, or between Balfour, Guthrie & Company and the home office of the complainant company, and between either of those offices and Huntington & Wilson for the reasons hereinbefore stated, and for the further reason that, if it is claimed for that testimony that it is in support of any claim as to an estoppel that it is incompetent, irrelevant and immaterial in that no estoppel is properly pleaded, and if any part of this evidence is competent for any purpose it is a part of the case of the defendant company in chief and in no way proper cross-examination. If our motion and our objections to the testimony referred to is denied and overruled, but not otherwise, we offer in evidence letter of Balfour, Guthrie & Company addressed to Eastern Oregon Land Company, Vale, Oregon, dated April 7th, 1908, and ask to have the same copied into the record: (Marked “A.”) Also letter signed by the same signature and having the same address dated April 9th, 1908 (marked “B”); also letter having the same signature and same address dated [379—323] April 24th, 1908, marked “C”; also letter having same signature and address dated May 12th, 1908, marked “D”; also letter having the same signature and ad-

(Testimony of Thomas W. Clagett.)

dress dated May 14th, 1908, marked "E"; also copy of letter addressed to W. S. Martin, San Francisco, California, signed A. B. Moss, dated May 20th, 1908, marked "F"; also copy of letter addressed Eastern Oregon Land Company, San Francisco, California, no signature, dated May 26th, 1908, bearing stamp "Balfour-Guthrie & Company, Portland, Oregon, Copy," marked "G"; also letter signed Balfour-Guthrie & Company addressed to Eastern Oregon Land Company, Vale, Oregon, dated June 1st, 1908, marked "H"; also letter signed Balfour-Guthrie & Company addressed Eastern Oregon Land Company, Vale, Oregon, dated March 27th, 1908, marked "I"; also letter same signature and address dated March 27th, 1908, marked "J"; also letter same signature and address dated March 5th, 1908, marked "K"; also letter same signature and address dated February 24th, 1908, marked "L"; also letter same signature and address dated February 13th, 1908, marked "M"; also letter same signature and address dated January 2d, 1908, marked "N"; also same signature and address dated December 26th, 1907, marked "O"; also copy of letter without signature addressed Eastern Oregon Land Company, San Francisco, California, dated December 21st, 1907, marked "P"; also letter signed Balfour-Guthrie & Company addressed Eastern Oregon Land Company, Vale, Oregon, December 23d, 1907, marked "Q."

Mr. HART.—I wish to object to the introduction of these letters with the exception of Letter "B,"

(Testimony of Thomas W. Clagett.)

which Letter "B" we join in offering unless the counsel will produce and will permit to be offered all of the letters passing between Balfour, [380—324] Guthrie & Company and Mr. Clagett, and the copies passing from Mr. Clagett, to Balfour, Guthrie & Company, as well as all the other letters passing from one to the other of those parties to Mr. Martin or the Eastern Oregon Land Company at San Francisco, and will permit counsel to examine those letter files and books so as to take from them such letters as are applicable to and pertain to the matter in controversy.

Mr. HUNTINGTON.—Counsel for complainant declines to submit to counsel for his inspection the correspondence referred to by him, or the correspondence covering the period from and after June 28th, 1908, and declines to turn over to counsel the letter files of the Vale office, or any other of its offices, but here states that if the counsel for the defendant will notify us of any particular letter or letters which defendant desires to offer in evidence the complainant is prepared to respond to any proper process to produce such particular record. Complainant further states that it objects to the introduction of and refuses to produce any further correspondence upon the cross-examination of this witness.

Mr. HART.—Counsel for the defendant company refers to the offer of the complainant company's counsel to produce such letter or letters as we particularly desire. The letters and correspondence being

(Testimony of Thomas W. Clagett.)

now all in the keeping of the Master, nevertheless for the proper examination of this witness we demand and ask counsel to hand to us all letters which Mr. Clagett may have written to the Eastern Oregon Land Company or to others and all letters which he may have received from that company either from the Portland office or San Francisco office from the time of his arrival in September, 1907, at [381—325] Vale up to the beginning of this suit, and in which the affairs of the defendant company or its rights are mentioned and discussed; and in further pursuance of his offer we further request him to produce the specific letters pertaining to this company and its affairs which may have passed between the same parties from the date of the beginning of the suit up until the present time, and owing to the fact that Mr. Huntington in his offer included also the letters passing between the parties and their attorneys; that is, between the Eastern Oregon Land Company and its attorneys, we therefore request that those letters also be produced. If you will comply with that request I will proceed to examine them and then may examine Mr. Clagett pertaining to them and will offer in evidence such of them as appear to us germane to the issues.

Mr. HUNTINGTON.—We decline to comply with the demand as made.

Redirect Examination of Mr. CLAGETT by Mr.
HUNTINGTON.

Q. You have been asked upon cross-examination to produce certain letters and you have produced the

(Testimony of Thomas W. Clagett.)

letters received at and written in your office concerning all matters pertaining to the development of Willow Creek irrigation down to and including June 28th, 1908. And counsel has had an opportunity to examine that correspondence. In the correspondence reference is made to the Malheur Irrigation Company and the Water Users Association. Do you know [382—326] anything about the result of the work of the Malheur Irrigating Company? Did they go ahead with their project?

Mr. HART.—Objected to as improper redirect examination, incompetent and immaterial.

A. They proceeded with their project until such time as they became involved and were finally sold out by the Court.

Q. Did their proposed project occupy any of the lands of the Eastern Oregon Land Company?

A. Yes, sir, their canals crossed land of the Eastern Oregon Land Company and they had also sought to establish a dam site on the land of the Eastern Oregon Land Company.

Mr. HART.—Objected to as improper redirect examination, incompetent, immaterial and ask that the answer be stricken for the reason it is immaterial and not proper redirect examination. Whilst these letters I have introduced have had reference to the Malheur Company, yet they also had reference to the present defendant company and were all interwoven one with the other, and were introduced in order to introduce the cause of the defendant company.

(Testimony of Thomas W. Clagett.)

Q. Do you know whether or not that company ever acquired or attempted to acquire any right to occupy such lands?

Mr. HART.—Will you permit my same objection to go all through every question?

Mr. HUNTINGTON.—Counsel permits that all questions he may ask from beginning to end of this examination are subject to any objection as to incompetency, irrelevancy, [383—327] immaterial and hearsay evidence, the same as if the objection was made to each question specifically.

A. I have seen a letter from the President of the Malheur Irrigation Company in which he stated the Malheur Irrigation Company claimed no right either in the canal or reservoir site which they had attempted to place upon the Eastern Oregon Land Company's land.

Mr. HART.—Objected to as hearsay and not the best evidence and ask that it be stricken out for the reason the production of the letters is the best evidence.

Q. After you came here were any negotiations made with the Eastern Oregon Land Company by the Malheur Irrigation Company so far as you knew to acquire the rights?

A. There never were so far as I knew.

Q. In other words, the Malheur Irrigation Company, as you understood it, proceeded to occupy lands of the Eastern Oregon Land Company and to construct its proposed system upon the lands of the Eastern Oregon Land Company without acquiring

(Testimony of Thomas W. Clagett.)

any right so to do just the same as the Willow River Land & Irrigation Company have attempted to do, isn't that the fact?

Mr. HART.—Objected to as incompetent, leading and argumentative and as a statement of something which is not the truth—that the Willow River Land & Irrigation Company has never attempted to use or occupy any of the lands of this complainant company. [384—328]

A. I would only know what I have seen in correspondence previous to the time when I went to work for the company.

Q. I am asking you about your personal knowledge since you went to work for the company—did they attempt to get any right?

A. They have not.

Q. And did they attempt to proceed without regard to the rights of the Eastern Oregon Land Company, so far as you know?

Mr. HART.—Object to the question. It is so foreign to the rules of evidence and therefore object to it as hearsay, incompetent and improper.

A. They did.

Q. What became, if you know, of the project of the so-called Federation referred to in these letters?

Mr. HART.—Objected to as immaterial, incompetent and not proper redirect examination.

A. The project was very active from the fall of 1907, through the year 1908, but since then it has failed and we understand has been entirely abandoned.

(Testimony of Thomas W. Clagett.)

Q. Was there a project known as the Water Users Association?

A. Never a project more than the organization of the Water Users Association and steps taken to proceed along the line of a project. Some properties were secured by the Water Users Association for a dam site.

Q. Have they ever acquired rights of way or proceeded to perfect their project so far as you know? [385—329]

A. They have never taken—

Mr. HART.—Objected to for the same reason— incompetent, irrelevant, immaterial and brings in an issue here which has not been brought in, improper redirect examination.

A. They have never taken steps to secure right of way. Their effort has been and is now toward the perfecting of their water rights.

Q. Is that an association of farmers along the creek who claim to have vested water rights by appropriation?

A. Yes, sir, I believe it includes all but two of the water rights aside from those controlled by the defendant company.

Q. You have been asked about your knowledge of the operations of Mr. Brogan, Mr. Cole and others along Willow Creek. Mr. Cole—or what did you learn that Mr. Cole had done with respect to securing options on land along the creek and about when?

Mr. HART.—Objected to as incompetent.

A. I cannot remember the exact month, but I would say about the first of December, 1908—it

(Testimony of Thomas W. Clagett.)

might possibly have been in November—that I learned he was securing these options along the creek.

Q. To what extent? Throughout the entire Valley or to a limited extent?

A. To the extent of about, as was said at that time, 10,000 acres of the lands along the creek which controlled water rights.

Q. Did you, in your observation of the proceedings, learn [386—330] whether or not those options were abandoned?

Mr. HART.—Objected to as calling for the opinion of the witness about something he did not know except by hearsay.

A. The options were placed in escrow in the First Bank of Vale and were terminable between the first of February and the 15th, 1908, as we were told and expired without being taken up.

Mr. HART.—We move that the answer be stricken out as purely hearsay, as he admits it was purely hearsay.

WITNESS.—I will add that I was so told by the Cashier of the Bank who was in charge of the escrow agreements.

Mr. HART.—The motion to strike out still stands on the same grounds as it is purely hearsay.

Mr. HUNTINGTON.—We offer in evidence page 228 of the letter-copy book the remainder of the letter of April 17th, 1908, which reads as follows:

“The initial point of the south bench canal belonging to the Malheur Company being on the line of the

(Testimony of Thomas W. Clagett.)

Emory Cole land water from the main channel of the creek could be diverted to it. You will recall that as matters now stand the Malheur Company can secure water for the canal only during extreme flood water as Cole would never let them tap the main creek. With land and canal both belonging to the Willow River Company water being had, the south bench canal [387—331] could be made to serve the land it was intended to reclaim. However, unless a larger storage system than now portrayed was established the purchase of the Malheur System would not be justified. Indeed we have doubted whether anyone could afford to buy out those holdings, but if Leonard Cole is to get \$20,000 for what he has to sell possibly the Malheur System is to pass to Mr. Brogan. The employment of Mr. Noot as the latter's engineer and the fact of the examination of the Upper Willow Creek Watershed having been lately made is fair ground for believing it will do so and that the dam in Cow Valley with feed canal from Willow Creek may yet be a reality. As we have said, if we were to hazard a guess it would be along that line. We have been trying to get hold of Mr. Cole or Mr. Brogan to talk with them in regard to the Company land which the former has agreed to transfer, but both have been absent from Vale."

Q. In the letter of January 1st, 1908, written by you to Balfour, Guthrie & Company, which Counsel offered in evidence, reference is made to C. E. Brainerd. Do you know who Mr. Brainerd is? That is,

(Testimony of Thomas W. Clagett.)

with what company was he connected?

A. He was and is the Secretary of the Malheur Irrigation Company.

Q. Reference is made in that letter to a Captain Dwyer. Do you know with what company he was associated, if any?

A. I never knew up until April of 1908. My first acquaintance with Captain Dwyer came in June of 1907, at which time he was cross-sectioning off the lands in the gorge above Cole's.

Q. Do you know whether he is connected with the defendant company? A. I do not. [388—332]

Q. Has he been here recently?

A. He was here in April at about the time when they organized their company. At least it was after the time when they opened their offices in the build-in which I was then and he told me he would be here—

Mr. HART.—Objected to as hearsay.

WITNESS.— —the considerable part of last year, but since then he has never been seen here to my knowledge.

Q. In this letter that I have just referred to you refer to a conversation with Emory Cole. I will call your attention to that part of the letter and I wish you would state if you remember just what Mr. Cole told you about Mr. Dwyer at that time?

Mr. HART.—Objected to as incompetent, irrelevant, immaterial and hearsay.

A. I do not recall the conversation. I had a

(Testimony of Thomas W. Clagett.)

great many conversations with Mr. Cole in relation to the undertakings in the canyon the first part of 1908 and I cannot recall any particular conversation.

Q. After the notices were served upon Mr. Brogan and Mr. Cole and upon the Willow River Land & Irrigation Company subsequently did Mr. Cole or any representative of the defendant company ever approach you with any proposition of purchasing either the land upon which their dam site was situated or acquiring any of the riparian rights of the complainant company?

A. They never did. Mr. Cole told me several times that he [389—333] claimed the land by adverse possession. Mr. Brogan, when I talked with him in regard to the matter, told me that if the land belonged to Leonard Cole he would be paid for it, and that was the only conversation I ever had with him.

Q. Did Leonard Cole ever make any claim of ownership to you of any of this land except by adverse possession? A. He never did.

Q. What, if any, effort did you make to ascertain whether or not any of these so-called mining claims were filed in the United States Land Office?

Mr. HART.—Objected to as incompetent, not the best evidence and immaterial.

Q. Did you make any investigations?

A. I remember the Portland Office suggesting it done, but I cannot recall whether or not I did so. I presume I did.

Q. So far as you know were any of those loca-

(Testimony of Thomas W. Clagett.)

tions ever filed in the United States Land Office?

Mr. HART.—Objected to as immaterial.

A. I do not know positively.

Q. In one of the letters that counsel offered in evidence reference was made to the “Appeal of Mr. Huntington.” Do you know what appeal was referred to?

A. If I could see the letter I could tell probably. I do not recall.

Q. It was a letter which related to the protest of the Eastern Oregon Land Company against the allowance or approval of the [390—334] maps or plans of the Malheur Irrigating Company?

A. I recall the facts now.

Q. What was the appeal if you know?

Mr. HART.—Objected to as immaterial.

A. It was on a hearing taken before a Commissioner by the United States—

Q. I do not care about a description of the proceedings. Only, was it an appeal in that proceeding?

A. It was; yes, sir.

Q. In some of this correspondence reference is made to the Beers and McPherson ranches. Where are they?

A. They are on Willow Creek above what is known as the “Canyon.”

Q. Above where this defendant company is proposing to build its dam?

A. The Beers reservoir site would be about seven miles above and McPherson’s still farther up the creek.

(Testimony of Thomas W. Clagett.)

Q. Have you ever been in the canyon where the defendant company is proposing to build this dam prior to the time you and Mr. Johnson went up there to make the survey of the lands?

A. Not prior to July, 1908.

Q. Then the first information you had from your own knowledge of the location of that dam and the building of it was at that time?

A. The first information we had was gained between the 20th and 25th of July, 1908.

Q. You had known, however, as I understood you to say, that they were hauling stuff up in the canyon?

A. I had. [391—335]

Q. But you did not know where the dam was until you made that survey? A. I did not.

Q. That canyon runs through Section 28, doesn't it, or part of it? A. Yes, sir.

Q. Does the company own any part of Section 28?

A. It does; that is, the Eastern Oregon Land Company.

Q. Are there any lands in the canyon up there that are not owned by the Eastern Oregon Land Company?

A. The Eastern Oregon Land Company owns a very small part of the canyon of Willow Creek.

Q. Do you know whether the Cole and Weaver options referred to in your letter of March 30th, 1908, to Balfour, Guthrie & Company were taken up? A. I know by being told by Mr. Weaver.

(Testimony of Thomas W. Clagett.)

Mr. HART.—Objected to as hearsay and incompetent.

WITNESS.—That his option was not taken up. The option of Mr. Cole was not taken up; I wasn't so told by Mr. Cole.

Q. Do you mean Mr. Cole told you his option was not taken up?

A. I say Mr. Cole never himself told me so.

Q. What was your understanding as to whether or not that option was taken up within the option period?

A. My understanding was that it was not.

Q. Do you know when the deed was finally made by Cole to the defendant corporation?

Mr. HART.—Objected to as not the best evidence.
[392—336]

A. I did not have the deed. According to the best of my recollection the first deed—there has been three deeds given by him—the first deed was given in the fall or winter of 1908. The last deeds were given very recently.

Mr. HUNTINGTON.—It is stipulated that the first transfer was from D. M. Brogan to Willow Land & Irrigation Company, was an assignment of agreement dated April 2d, 1908, and recorded April 3d, 1908.

It is further stipulated that the first deed from Cole to the Willow River Land & Irrigation Company was dated the 15th day of May, 1908, and filed for record the 25th day of February, 1909.

It is further stipulated that an agreement from

(Testimony of Thomas W. Clagett.)

Leonard Cole to D. M. Brogan, agreeing to convey a certain portion of Section 21, Township 14 South, Range 42 East, known as the Bothwell Mining Claim, recorded December 5th, 1894, and a portion of Section 27, Township 14 South, Range 42 East, known as the Insenhorfor Placer Mining Claim and other portions of Section 27 in the same township known as the Otilda Placer Mining Claim with ditches and water rights therein described was executed March 17th, 1908, and filed for record April 3d, 1908, and that the assignment of agreement above referred to dated April 2d, 1908, transferred that contract to the Willow River Land & Irrigation Company. The land in Section 27 described in said contract being the northwest quarter of the northwest quarter of the southwest quarter, the southeast quarter of the northwest quarter of the southwest quarter, the west half of the northeast quarter of the northwest quarter and west half of northeast quarter of northwest quarter, the east half of the southwest quarter of the southwest [393—337] quarter of Section 27, Township 14 South, Range 42 East.

Q. You were asked on cross-examination as to whether or not the policy of the complainant company had not always been to induce or to rely upon the improvement of adjoining lands for an improvement of their own lands. What is the fact as to the policy of the company in that respect?

A. The company has not on this end of the grant generally improved their lands, but what their policy is I cannot state more than that.

(Testimony of Thomas W. Clagett.)

Q. Has it been their policy so far as you know to attempt to retard the improvement of the country in any way?

A. No, sir, it has not. They desired to see the country improved.

Q. In one of the questions asked you by counsel for the defendant on cross-examination your answer, as I understood it, was subject to the construction that you had examined the channel of the creek only from Section 31 down to Section 5. Did you so intend to be understood?

A. Do you mean the Valley generally?

Q. The channel of the creek.

A. I have never made an examination of the entire channel of Willow Creek. On the occasion when these surveys were made I examined the channel whenever we crossed it, and I have been going over the lands of the Eastern Oregon Land Company and have seen the channel in many places, but I have not examined the entire channel of Willow Creek.

Q. Have you examined it below Section 5, Township 17-44? A. I have.

Q. As it passes through the lands of the company? A. I have. [394—338]

Q. In measuring the depth of the various channels concerning which you have testified you say you measured them by a comparison with your own height, or by using your own height as a measure?

A. I did.

Q. Is the bottom of the creek-bed anywhere per-

(Testimony of Thomas W. Clagett.)

factly level? A. No; it has a fall to it.

Q. I mean by that—suppose you should make a measurement with a tape-line at one place and measure it again five feet away would you get exactly the same measurements?

A. Why, the distance from the bed of the creek to the top of the bank would not be the same within a few feet. As a rule, though the channel of Willow Creek is cut to the gravel and, of course, whenever it is so cut in taking into consideration the fall of the creek-bed it would be about the same.

Q. But the contour of the surface of the ground, as I understand you, is changing?

A. Yes, sir.

Q. And would vary perhaps a few inches, or might vary more than that in a distance of ten or twenty feet?

A. It might vary a foot or two, owing to washes in the banks.

Q. Then these measurements in the depth at the points where you made the measurements were made as nearly accurate as you could, as I understand you?

Mr. HART.—Objected to as leading and not proper redirect examination.

A. We were trying to make an honest estimate of the depth of the channel.

Q. On some of the tracts which you testified to having measured [395—339] as inundated lands you stated that there was some growth of greasewood, and, in some places, some sagebrush, but you measured of such lands only such as had a growth

(Testimony of Thomas W. Clagett.)

of grass. Now, what kind of grass was growing there?

A. The grass differs at different points in the Valley, but it is chiefly red-top, blue-grass, and, on one property, fox-tail.

Q. Was it the same kind of grass that grows on adjacent lands which are mowed?

A. Why, yes, sir.

Q. Then, if this greasewood and scattering sagebrush to which you referred was removed state whether or not that land would be the same as the adjacent land.

A. It could be mowed just the same as the other; yes, sir.

Q. I am not sure whether you were asked when you were on the stand before or not as to the land which you claim was overflowed in Section 25 being land which was mowed or had been mowed.

A. I stated, as I remember, I had never made any particular measurement of the mowed land, but, to the best of my recollection there would be about something like 15 or 20 acres.

Q. That had been mowed?

A. That had been mowed.

Q. This year?

A. Not this year or last year.

Q. What are the indications as to its having been mowed at the time when the last crop of grass grew there?

A. I saw hay cut upon it and stacked in 1907.

Q. Was there any indications upon the ground

(Testimony of Thomas W. Clagett.)

itself of hay having been cut?

A. Yes, sir, it showed plainly that some hay had been cut on [396—340] that land.

Q. Do you know whether greasewood will stand flooding or not? Will it continue to live when it has been flooded?

A. I do not know from personal experience.

Q. Referring to the knoll concerning which you testified as being on the, or within the, portion of the section shown as overflowed land on Exhibit 6, was that knoll included in the acreage which you gave as the land overflowed land?

A. The acreage I gave was of the land that is overflowed.

Q. Did that acreage include this knoll?

A. It did not.

Q. And whatever acreage there was in the knoll then is not included in the 41 acres or whatever the acreage is there, as I understand it?

A. It was not.

Q. You stated you had never seen this land overflowed, have you ever seen lands of this character and having substantially the same kind of growth upon it overflowed in other places? A. I have.

Q. Where? A. In Eastern Washington.

Q. Lands upon which sagebrush grew?

A. Some; we have very little sagebrush in Eastern Washington.

Q. Is your judgment of what is overflowed land; that is, judging from appearance, is that based upon

(Testimony of Thomas W. Clagett.)

the appearance of ground here as well as your past experience?

Mr. HART.—Objected to as leading, incompetent, not proper redirect examination and simply going over again his examination in chief. [397—341]

A. It would be based upon both; yes, sir.

Q. How large are these knolls which you say you paid no attention to? Can you give us some approximate idea as to how far across them it would be, and as to whether they are round, or so the Court can know something definite about the size and form of them?

A. In this Section 5-16-43, upon which I was particularly questioned, there is very little difference in the elevation of the land above the creek-bed. The water as it would overflow this land in places, of course, worked back as far as the land was level or nearly so, and then upon the higher point at any point in the field or which has an elevation of more than one foot above the surrounding land these lands along the shore line would not be covered, the water flowing back along the lower line, and we did not try to follow the sinuositities of the shore line. I would think at no point in these ridges do they vary more than a few feet. I do not recall any that were more than ten or 15 feet in width. They were long points that extended from the main body of dry land down into the other.

Q. Now, how was it with respect to there being nearly as long points of low land that extended far back into the sagebrush land?

(Testimony of Thomas W. Clagett.)

A. I would say that we left out of this line as we meandered it more of land that is inundated than what was included within the line of dry land that is not inundated.

Q. What is the nature of the soil of these so-called knolls or elevations?

A. It is the same as the other and has grass upon it. I speak now of these points in Section 5-16-43.

Q. Would they be susceptible of being straightened off or [398—342] levelled off without expense?

A. They would with very little expense.

At the hour of 11:50 o'clock A. M. adjourned until 1:30 o'clock P. M. to-day—July 24th, 1909.

At the hour of 1:30 o'clock P. M. July 24th, 1909, met pursuant to adjournment as above. Present: Same as before.

THOMAS W. CLAGETT, recalled to stand.

Redirect Examination (Continued) by Mr.
HUNTINGTON.

Q. That deed from Emory Cole to the Willow River Land & Irrigation Company, does that cover anything but the ranch property and the water rights connected with the ranch property?

A. It does not; no, sir.

Q. About how far is the dam of the defendant company from the Town of Vale by the road as usually travelled prior to the fall of 1908?

A. It is about 38 miles.

Q. I think you have testified that the dam site is in a deep canyon with precipitous sides?

(Testimony of Thomas W. Clagett.)

A. I have.

Q. Does the county road cross the canyon?

A. There is no county road in that vicinity. The nearest road that crosses the canyon is about two miles above the dam site. I don't know whether it is a county road [399—343] or not but it is a traveled road.

Recross-examination by Mr. HART.

Q. You spoke of the fact and testified that the options given by Mr. Weaver and Mr. Cole to the company or to Mr. Brogan or to anyone connected with the company had expired or were not taken up, you said you heard that? A. I did.

Q. You do know, however, that the lands described in those options were afterwards conveyed to the company and the company now owns them?

A. I think the majority of the land—I don't know that all of it was but I think that it was.

Q. You also said, I believe, that the Eastern Oregon Land Company had not—in answer to Mr. Huntington—had not retarded or attempted to prevent the growth and development of the Willow Creek Valley? A. I did.

Q. And the general agent of the complainant company located here in Vale you took your instructions and obeyed them from the Portland Office or from San Francisco?

A. From the Portland Office; yes, sir.

Q. Now, you mentioned to Mr. Huntington some corporation or irrigation concern as the Malheur Irrigation Company, is that the name of it? [400—

(Testimony of Thomas W. Clagett.)

344] A. Yes, sir; it is.

Q. It is a bursted concern so far as you know?

A. I would call it so; yes, sir.

Q. You and the various officers of the complainant company had quite a time trying to hook up that company with the present company through your correspondence?

A. We had only the desire to establish the truth.

Q. You wanted to establish the truth?

A. Yes, sir.

Q. The truth about what?

A. As to the real situation; the *force* that were behind the different parties on the creek that were then contending to put in irrigation properties.

Q. Did you have any interest in that company—did you have any interest in it?

A. I did not claim to be a part owner of it.

Q. They let your affairs alone; they never came about you?

A. No, sir; they never approached us in any way.

Q. But you were instructed to put out feelers and intermeddle with their affairs?

A. I did not.

Q. And you were also instructed and did organize, or assist in the organization of the Water Users Association amongst the farmers—one of their associations, whichever it was, for the purpose of obstructing the work carried on by this defendant company?

A. I was not so instructed.

Q. Did you do any work up there?

(Testimony of Thomas W. Clagett.)

A. I had no interest or connection with the Water Users Association and was not aware of the Water Users Association until it was formed. [401—345]

Q. Did you take any part in the Water Users Association for the purpose of obstructing or checkmating, as you called it yesterday, the work carried on by this company in its own business affairs?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

Mr. HART.—I think it is perfectly competent because you asked him if he tried to obstruct or retard the affairs of this company.

Q. Answer the question “Yes” or “No”?

WITNESS.—Do you mean at that time?

Q. Yes, sir, at that time.

A. I never have except as I have conversed with members or directors of the Water Users Association.

Q. But you did do it by conversing with the members and directors of the Water Users Association?

A. I have talked with members of the Water Users Association as to what is best for the protection of their pursuits and water interests.

Q. Wasn't you instructed by a letter or by Mr. Mackenzie to get busy and obstruct or checkmate the affairs of this company?

A. I never was at any time, especially in that form.

Q. Were you at any time or your company stock-

(Testimony of Thomas W. Clagett.)

holders in the Malheur Irrigation Company?

A. We never was.

Q. You did attempt to throw stones in its way—the Eastern Oregon Land Company? [402—346]

A. We attempted to do so.

Q. They even went so far secretly as to send lawyers to the Secretary of the Interior and Land Commissioners' Office, didn't you?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant, immaterial, not the best evidence, suggesting that which is wholly without foundation.

A. I know nothing about the employment of attorneys there secretly to care for the matter.

Q. You do not?

A. We have a firm of retained attorneys in Washington, D. C.

Q. I will ask you if Mr. Mackenzie did not ask you in a letter, in confidence, which is one of the letters in the file here, saying they had employed attorneys there and for you to keep it secret or in confidence?

A. I do not recall that letter. If it is in the files it undoubtedly was received.

Q. You also assisted in some lawsuit, as the friend of the Court discloses by a letter, in some lawsuit by one of these irrigation companies?

A. I do not know to what you refer at all.

Q. Did you take part in any lawsuit against any irrigation company where your company was not one of the parties to the lawsuit?

(Testimony of Thomas W. Clagett.)

A. Never that I know of; no, sir.

Q. You did not? A. No, sir.

Q. Now, this Federation Company, you also carried on negotiations with it too, didn't you? [403—347] A. We did.

Q. And you carried on negotiations with the Malheur Irrigation Company, didn't you?

A. We have had correspondence with them.

Q. You carried on negotiations with them?

A. Of a certain kind; yes, sir.

Q. And you carried on negotiations of a certain kind with the Water Users Association?

A. I was in touch with all of them.

Q. Each one of these corporations was formed without the Eastern Oregon Land Company being one of the organizers?

A. They had nothing to do with it.

Q. But, as soon as they attempted to do some business, or spent some money, or developed something or other in this Valley, why then you proceeded to get in touch with them as the expression was used in this letter?

A. We had large interests in the Valley to protect, and our aim was always to protect our own interest and our own welfare in those lands.

Q. Answer my question.

A. Yes, sir.

Q. And as soon as you got in touch with those companies every one of them withered and died?

A. We antagonized the Malheur Irrigation Company but we never antagonized the Federation.

(Testimony of Thomas W. Clagett.)

Q. As soon as you ever got in touch with them, or the Eastern Oregon Land Company got in touch with them, shortly afterwards they all died?

A. Both of those I speak of died.

Q. And the Water Users Association they never did anything after you got in touch with them?
[404—348]

A. No, sir, that is not true; they have done something.

Q. The only one that has is this present company?

A. I don't believe I am in touch with them.

Q. And they are still in business and trying to do some business? A. I think so.

Q. Now, you were instructed while you was trying to get in touch with the present company, and while you were in touch with the Federation Company you were also in touch with the Malheur Company, its rival, wasn't you?

A. We never had any dealings with the Malheur Irrigation Company other than to seek to find out whether they were able to proceed with the project.

Q. Answer the question—

A. As I understand the first part of the question—

Q. I will withdraw the question and ask another. The Malheur Irrigation Company had a rival project to the Federation Company? A. It did.

Q. And the Eastern Oregon Land Company, acting through you, became in touch, or came in touch with the Malheur Irrigation Company?

A. Not in the sense you use the word.

(Testimony of Thomas W. Clagett.)

Q. In the sense you use the word in "touch"?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

A. In that sense; yes, sir.

Q. And at the same time you were in touch with the Federation Company, that rival concern, wasn't you? [405—349]

A. The Federation operations in my time here have been since the operations of the Malheur Irrigation Company.

Q. Doesn't all of your letters, or many of them make detailed reports about what was being done by the Malheur Irrigation Company and the Federation Company and about the Water Users Association?

A. I was in touch with what they were seeking to do and accomplish.

Q. And you were instructed to do business or to make overtures through both of them through your home office? A. I never was.

Q. At the same time the Water Users Association or directly afterwards was organized?

A. I think the Water Users Association was organized about the time the Federation begun to lose their prospect of putting their project through.

Q. Then you came in touch with the Water Users Association?

A. Not until recently to any extent.

Q. But you became in touch with them to a marked extent after being instructed by the people in Portland in order to thwart the Willow River Land & Irrigation Company?

(Testimony of Thomas W. Clagett.)

Mr. HUNTINGTON.—Object to all of these questions as incompetent, irrelevant, immaterial and not proper recross-examination.

A. I never was so instructed. On the contrary all advices from the Portland Office were to the effect that in their judgment they did not think anything would be gained by proceeding in conjunction or in co-operation with the Water Users Association.
[406—350]

Q. Didn't they tell you to keep in touch with both of them and then join that one, in effect, join that one which you thought would make the most for your company? A. No, sir.

Q. But they did in one letter tell you to do some business with either the Malheur or Federation company, and at the same time told you to make the same kind of talk to the Seattle Syndicate or Mr. Brogan?

A. They never did.

Q. There is nothing of that kind in the letter I read you yesterday?

A. The matter in that letter is entirely foreign to what you sought to make me say it was.

Q. Well, sir, I never sought to make you say anything except to tell the truth.

A. That is all that I wish to tell.

Q. And isn't it true that in one of those *letter* you were there told to make certain talk to one of these companies, and also to make that certain talk to the Seattle Syndicate?

A. No, sir, it does not. I was instructed that the same position might be taken to both companies.

(Testimony of Thomas W. Clagett.)

That is my understanding of the letter.

Q. That is the way you wish to express it; that is the expression of the truth as you understand it?

A. As I understand it.

Q. But the company also told you to tell the Seattle Syndicate or Mr. Brogan something and to say the same to the Federation Company. Did you inform either one of them you had talked the same way to the other?

A. I never did. The letter was designed to suggest to me the course of action which could profitably be assumed to the [407—351] benefit of the company. I was not instructed to make any talk to either of the companies.

Q. Was the letter which told you to buy some land, in speaking—one of Mr. Mackenzie's letters to you spoke of there would possibly be some hydraulic mining development in the Valley and you were told to buy a piece of land so they would have to come to you to do some business. Was that for the purpose of protecting your bench lands up here or for the purpose of obstructing the developments in the valley?

A. It was designed for the purpose of putting us in a better position to protect our own properties.

Q. That is, you could use the matter so as to force some other company to come to your terms if you got a piece of land, that was it, wasn't it?

A. I think not.

Q. That is what you do wish to do?

A. We desire to take care of our own.

(Testimony of Thomas W. Clagett.)

Q. That is what you tried to do with the Malheur people and all the rest of the persons trying to help this Valley is to force them to come to your terms?

A. We never have antagonized any but the Malheur Irrigation Company and the Willow River Land & Irrigation Company and our antagonism to their operations springs solely for the reason we do not believe, or in the case of the former, was a practical form for the legitimate development of the Valley.

Q. You didn't believe that it was practical for the legitimate development of the Valley?

A. Yes, sir.

Q. And you say that on your oath?

A. Yes, sir, I do. [408—352]

Q. And the Eastern Oregon Land Company has been here for 25 years and cleared off 120 acres of land? A. Yes, sir.

Q. You know that this Willow River Land & Irrigation Company has planted more fruit trees in the Valley in the last year than was ever planted in the whole 25 years that the Eastern Oregon Land Company has owned, isn't that true?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, immaterial and in no way concerned with the issues in this case.

A. It is.

Q. Don't you think it a legitimate development of a Valley where hundreds of acres of fruit trees have been planted where previously sagebrush grew?

A. It is to the extent to which those fruit trees

(Testimony of Thomas W. Clagett.)

are planted and the land so occupied.

Q. And that is a few times more development than the Eastern Oregon Land Company has done in its whole history in this Valley? A. It is.

Q. Then if this Willow River Land & Irrigation Company is not a legitimate development after having done that will you please express your opinion of the development of the Eastern Oregon Land Company—

Mr. HUNTINGTON.—Our objection goes to all of this.

Q. If we were not legitimate in doing what we have done will you please tell us what you think of the development of your own company? [409—353]

A. I am not called upon to pass an opinion upon the actions of my own company.

Q. Then why are you so willing to pass an opinion and voluntarily so, upon the actions of another company who have done more than your company?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent, irrelevant and not bearing upon the issues of this case.

A. Because I have an addition to make to that statement. I was asked if their operations were legitimate development of the Valley. They are a legitimate development for their own properties; we do not consider it is a development for the general valley.

Q. You mean that this company has attempted to develop their own lands in such a way that they are not developing your own lands?

(Testimony of Thomas W. Clagett.)

A. No, I do not mean that.

Q. You said yesterday you expected to develop your lands when your neighbors developed theirs?

A. Yes, sir.

Q. And this company has developed and is developing its own properties in such a manner as not to improve yours?

A. Not in the sense in which I spoke yesterday.

Q. This company is developing its own lands in such a manner as not to improve yours?

A. The development of the Willow River Land & Irrigation Company has helped to develop the upper valley, and, consequently, our lands to the extent to which that improvement goes, but there would be a further question as to the [410—354] ultimate development of our lands and upon other lands other than those of the defendant company.

Q. Do you want people who own land up in the upper valley to hold it for another 25 years until the Eastern Oregon Land Company get ready—

A. We do not.

Q. And because the Willow River Land & Irrigation Company has developed its own lands, brought settlers in, planted hundreds of acres in fruit trees, because it has done that and not as you would like to see it do, do you think its development is illegitimate?

A. Not because they have done that.

Q. Well, because they have done it in a way you didn't want them to do it?

A. Because we considered that in developing

(Testimony of Thomas W. Clagett.)

their lands they were seeking to take from us that which we have always enjoyed, and that as they advanced their interests the interests of the remainder of the Valley would be injured.

Q. If they were taking from you something you have always enjoyed tell us what?

A. Since 1867 we have had the water of Willow Creek flow through our lands.

Q. Since 1867 you have had the water of Willow Creek flow through your lands?

A. That lie up on Willow Creek.

Q. You mean flow over these few fractions that raise that wild hay—the few acres that raise the wild hay you told about?

A. I mean that flow through our lands affording us with stock water and form our hay lands and meadows.

Q. Don't use the expression so broad—hay lands and meadows. [411—355] You gave the description to me yesterday on cross-examination and on examination you gave us the description as flood-water and that you said that was taken from you by the Willow River Land & Irrigation Company?

Mr. HUNTINGTON.—Object to the form of the question, and manner of the examination for the reason it is undertaking to dictate to the witness his manner of testifying—objected to as incompetent, not proper cross-examination, immaterial, irrelevant and wholly foreign to the issues of the case.

Q. You know, as a matter of fact that all of the water of Willow Creek has been appropriated by

(Testimony of Thomas W. Clagett.)

prior appropriators running back for thirty years and more, don't you?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and wholly foreign to the issues of the case.

A. I do.

Q. And the Eastern Oregon Land Company never held an appropriation of water for any of its lands on Willow Creek, did it? A. No, sir.

Q. And these appropriations covered all of the water many times, or more than all of the water flowing in Willow Creek?

A. Of the normal flow.

Q. But not of the flood water?

A. Not of the flood water.

Q. But of the normal flow it covered many times more? A. About 530 times. [412—356]

Q. Then, if those appropriations were applied to the full flow throughout the year it would absorb not only the continuous but also the spring freshets and floods? A. That would be guesswork.

Q. Can you tell me the amount of water that annually flows down Willow Creek in the year?

A. I can tell you what the Government Gauging Stations gave but not from my own experience or knowledge.

Q. Do you know the amount of water that is covered by the water appropriations of Willow Creek?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

(Testimony of Thomas W. Clagett.)

A. In inches?

Q. Yes, sir. A. I do not.

Q. This Willow River Land & Irrigation Company, the defendant, has not, up to the time of the commencement of this suit, even under your statement, used any of the water which you thought you was entitled to have flow by your place?

A. They have.

Q. Not up to the time of the commencement of the suit? A. No, sir.

Q. The defendant company has not used any water up to the present time that flows through or into the canyon or the dam located there as described in your complaint, has it?

A. Not in the way of irrigation, no, sir.

Q. Not in the way of irrigation. Then, so far as the allegations in your complaint is concerned, they have never damaged you at all, have they, by preventing the flowing of water past your place? [413—357]

A. Not at this time; it is only a threatened injury.

Q. You think it is a threatened injury?

A. I certainly do.

Q. Then, because they wanted, or you thought this company wanted, to store up a small portion of the flood water to use it in irrigating their own lands you thought that was an injury to you?

A. I did.

Q. You know that nearly all of the water appropriations which you say are 500 times more than the

(Testimony of Thomas W. Clagett.)

amount flowing through the creek, you know that nearly all of those water appropriations the present company now owns, don't you?

A. I do not so know.

Q. You know that Mr. Cole owned the prior rights to all the water?

A. To the extent to which he had made appropriation.

Q. And the extent of his appropriation included all the water flowing in the creek with the exception of flood times? A. I do not know that.

Q. That is true of the other farmers living up in that country, isn't it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination and part of the defendant's case if it is material at all under the issues in this case.

Q. That other persons living up in that vicinity of Mr. Cole's have also transferred to this company all their water rights?

Mr. HUNTINGTON.—Objected to as incompetent, not the [414—358] best evidence, hearsay and not proper cross-examination.

A. To the extent to which the defendant company has purchased land.

Q. Now, the land you described the other day, of which you gave the descriptions as being owned by this company is all contiguous each to the other?

A. They corner; I would not say contiguous.

Q. And they all join on Willow Creek too, don't they?

A. All of our riparian lands? I thought you

(Testimony of Thomas W. Clagett.)

were referring to the Eastern Oregon Land Company—they are not; there is one tract I know of that is not contiguous.

Q. What tract?

A. The tract in Section 16.

Q. That this company owns?

A. That has been deeded to this company.

Q. And it does not join onto the other pieces of property? A. It does not.

Q. How much land is there in Section 16?

A. 160 acres.

Q. With the exception of that 160 acres the other is all contiguous? A. I believe that it is.

Q. And Willow Creek flows all through portions and parts? A. Parts of it.

Q. And you know that it was and is the purpose of this Company to use the water which it intended to store in the contemplated reservoir in the gorge to irrigate this land during the months of June, July and August?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, [415—359] as leading, but we will concede in this case that it is the claim of the defendant company that whatever water it takes out of Willow Creek it proposes to take onto its own lands and use on its own lands. We will further concede that the defendant company has succeeded to the appropriation, whatever it may be, of Emory Cole and that the lands conveyed to this company by Emory Cole were served and are still being served by the water appropriated by Emory Cole

(Testimony of Thomas W. Clagett.)

and his predecessors.

Mr. HART.—We are very glad you make that concession, but you have put into my mouth something very skillfully—you say “we claim.” The defendant company claims that it has the right, should it buy other additional lands in that vicinity, and which are contiguous to these properties that it now owns to irrigate them; it claims the right, should it have water, more than sufficient to irrigate its own lands, to sell the water to the Eastern Oregon Land Company if it will buy it or to anybody else that wants to buy it.

WITNESS.—(Answering question.) I do.

Q. And you knew that it was the purpose of the company to irrigate that land at the time this suit was brought, didn't you?

A. We presumed that was their intention, undoubtedly.

Q. Yes, yes. Now, the only other element—are there any other elements which went to make up that statement that they was doing illegitimate, or wasn't doing legitimate development, other than these you have given? A. I think not.

Q. The statement did not *not* have any reference to the occupation [416—360] of the dam site.

A. The occupation of the dam site has nothing to do with the development of the valley.

Q. With the legitimate development of the valley?

A. No, sir, so far as the Eastern Oregon Land Company is concerned.

(Testimony of Thomas W. Clagett.)

Q. You testified in redirect examination that you never knew where the dam was to be built until between July 20th and July 25th, 1908?

A. I said until we made that survey we did not know where the dam site was being built.

Q. And yet during the months running clear back to December, 1907, you had written many letters to the company at Portland telling them of the construction of this dam in the valley, or in the gorge, hadn't you? A. I had.

Q. And had received numerous letters from the company speaking of the place in the canyon as being a dam site? A. Which place?

Q. The place where this dam now is constructing on Cole's mining property?

A. We had many letters passed between us as to the location of the dam on the Cole mining property.

Q. And you therefore knew of the dam on the Cole mining property when you wrote your principals about it? A. I did.

Q. And you had that knowledge through the months of December, 1907, and January and February, 1908?

A. Never until along the 10th of April, 1908.

Q. Didn't you write letters to your company describing the location which have been offered in evidence previous to 1908? [417—361]

A. I did not.

Q. Did the company write you anything about it?

A. The first notice I ever had that Leonard Cole

(Testimony of Thomas W. Clagett.)

claimed any interest in that mining claim came to me through a letter dated the 9th April, 1908, written from the Portland office to me.

Q. And the company had knowledge of the fact that Mr. Cole claimed it before you did then?

A. The Portland Agent of the company knew of that conveyance.

Q. Mr. Mackenzie knew development was going on in that gorge in November, 1907, didn't he?

A. We did not.

Q. Didn't he write you a letter to that effect dated November 23d, 1907?

A. No, sir, not to that effect.

Q. Didn't he tell you in that letter that when he was in the vicinity in the spring he rather expected some developments in that place?

Mr. HUNTINGTON.—Objected to as not proper cross-examination—not the proper method of cross-examining the witness as to secondary, hearsay, irrelevant and incompetent. If the counsel desires to examine the witness as to the contents of the letter we insist he should be shown the letter.

A. I can give my recollection of the letter. I saw the letter here but did not read it.

Q. Get it right over there and read it.

A. There is one here the 26th of November.

Q. I will read it to you. (Counsel reads letter to witness of November 26th, 1907.) Now, do you recall of receiving that [418—362] letter, which I now hand you? A. I do.

Q. And that letter shows that the company knew

(Testimony of Thomas W. Clagett.)

as early as the spring of 1907 that work was going on in that gorge or contemplated and money was being expended in acquiring properties pertaining to it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, inserting in the record the argument of the counsel, incompetent and irrelevant.

A. The only source of information, or the only way they had of judging as to what was being done in the canyon at that time you speak of is, they knew that an option had been taken on the ground and that the persons who took the option would prospect for gold.

Q. And they thought it might also be used for irrigation purposes?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, inserting in the record the argument of counsel, incompetent and irrelevant.

A. They thought it might.

Q. And you were instructed to buy some property down below so you would have some little say about it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, inserting in the record the argument of counsel, incompetent and irrelevant. [419—363]

A. I was to consider the merits of it.

Q. So you could act as an obstructor of the valley?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, inserting in the record the argu-

(Testimony of Thomas W. Clagett.)

ment of counsel, incompetent and irrelevant.

A. No, sir, not for that purpose.

Q. So you could act as an obstructor in the transaction by this company of its plans?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, inserting in the record the argument of counsel, incompetent and irrelevant.

A. Not for that purpose unless they were operating inimical to the development of the valley.

Q. What do you mean by “development of the valley”?

A. I mean of the entire valley.

Q. Do you mean of the people who go to work and improve their property, or the people who do not improve their property?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, as not calling for any matter that can be material to the issues in this case.

Q. All right I will not insist upon it.

Mr. HUNTINGTON.—That is insulting.

Mr. HART.—Now, I will insist upon it.

WITNESS.—I referred to the lands in the valley and not to the people of the valley.

Q. You knew my question did not have reference to the people [420—364] in the valley when you made that answer?

A. I think it had reference to the people in the valley as I understand it.

Q. You think that because of the letters you have written to the Portland people about people of the valley and letters written to you about the people

(Testimony of Thomas W. Clagett.)

of the valley?

A. I did not have anything of that kind in thought.

Q. What you mean by development of the valley is development of the land that is owned by people who will develop their land?

A. I mean the entire valley.

Q. Do you mean by that it is inimical to all the lands in the valley if one does improve his own land?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, as not calling for any matter that can be material to the issues in this case.

A. If by development of his own lands he makes it impossible for others to develop theirs.

Q. But if he lays his course so that they can all develop their property?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, as not calling for any matter that can be material to the issues in this case.

A. I would say that it would be to the advantage of the valley.

Q. It is to the benefit of the valley when one person's efforts brings in thousands of dollars and plants thousands of trees thereon? [421—365]

A. Yes, sir.

Q. You know that Mr. Scott, after the institution of this suit by the present complainant company, that thereafter Mr. Scott instituted a suit also against the present defendant company which was tried some time since?

Mr. HUNTINGTON.—Objected to as incompe-

(Testimony of Thomas W. Clagett.)

tent, irrelevant, immaterial and foreign to the issues of the case.

A. I do.

Q. Now, did you have anything to do in persuading Mr. Scott and the other farmers to join in that suit?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and foreign to the issues of this case.

A. No, sir.

Q. You had no connection with it officially or otherwise?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and foreign to the issues of this case.

A. I did not.

Q. Was the Eastern Oregon Land Company consulted pertaining to the bringing of that suit?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and foreign to the issues of this case.

A. They were not.

Q. Mr. Scott, who brought the suit, was one of the prominent [422—366] members of the Water Users Association, however?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and foreign to the issues of this case.

A. He is.

(Testimony of Thomas W. Clagett.)

Re-redirect Examination by Mr. HUNTINGTON.

Q. Mr. Clagett, you have been asked by counsel for defendant many questions concerning the opposition of the Eastern Oregon Land Company to the plans of the Malheur Irrigation Company. You were present at the hearing of the protest filed by the Eastern Oregon Land Company in the United States Land Office against the approval of the maps of that company, were you, at Ontario?

Mr. HART.—Objected to as incompetent, not proper redirect examination, and my questions pertaining to the Malheur Irrigation Company, the questions were all brought out because counsel went into that subject in his first redirect examination.

A. I was.

Q. Now, isn't it true, Mr. Clagett, that this Malheur Irrigation Company had done no work in the way of extending their [423—367] project for some years prior to their application for approval, had acquired no rights of way, and no reservoir sites, although their canals crossed the lands of private owners, and their reservoir sites were upon the lands of private owners, isn't that true?

Mr. HART.—Objected to as leading, incompetent and immaterial.

A. It is.

Q. The opposition then of the Eastern Oregon Land Company was to get out of the way a project which was believed not to have any *bona fide* intent of bringing water into the valley, isn't that true?

Mr. HART.—Objected to as incompetent, and I

(Testimony of Thomas W. Clagett.)

will ask counsel not to abuse the rules of evidence.

A. It is.

Q. A default decree was finally entered in a suit brought by the Eastern Oregon Land Company to enjoin that company from further interfering with its property and the Malheur Irrigation Company allowed the suit to go by default, isn't that true?

Mr. HART.—Objected to as leading and incompetent and not the best evidence.

A. There was such a decree rendered.

Mr. HART.—I will ask that all of those last questions [424—368] be stricken from the record for the reasons formulated in the various objections.

Witness excused.

Mr. HUNTINGTON.—Here is the certified copy of the plat we offered in evidence. I think this is exhibit "1," if I remember rightly. (Counsel hands plat to Mr. Hart.)

Mr. HART.—We have no objections to the introduction of this plat.

Plaintiff's rest. [425—369]

[**Testimony of Thomas W. Clagett, for Defendant.**]

THOMAS W. CLAGETT, a witness produced on behalf of the defendant, having been heretofore sworn, testified as follows:

(Examined by Mr. HART.)

Q. You brought correspondence books and certain letter files into the courtroom the other day?

A. I did.

Q. Those, with the exceptions of the ones that

(Testimony of Thomas W. Clagett.)

were returned to you, are the ones that are left in the keeping of the Master or which have been already read into the record and introduced in evidence? A. Yes, sir.

Q. Have you any other correspondence with this company during your period here as a resident agent with the exception of those introduced into this court?

A. I have, but not relating or mentioning this subject.

Q. You have no letter from them referring to this irrigation of the Willow River valley and this company except those that have been brought to court? A. I have not.

Q. And you have written none pertaining to that subject?

A. I have a book subsequent to the book brought in but there is nothing covered by the period covered by that letter-book.

Q. How late does that letter-book run down to?

A. I believe until April of this year.

Q. Have you had correspondence since April of this year pertaining to that company and the work it is doing in the [426—370] valley?

A. I have.

Q. And you have received letters from either the Portland office or the San Francisco office and have written letters to them pertaining to it?

A. I have.

Q. And those letters you did not bring into court?

(Testimony of Thomas W. Clagett.)

A. They are in my desk in the drawer of unfiled letters—a few letters received in the past week. I think it is within the last week; I think everything was filed up to then.

Q. Everything up to the last week?

A. Yes, sir.

Q. Now, all of these letters which were introduced in the cross-examination, and which I think proper as cross-examination, and which were furnished by the complainant company, I will now offer to introduce them also so as to save any question upon the subject as letters and documents obtained from the complainant company and offer them in evidence for the defendant.

Mr. HUNTINGTON.—We object to each and all of them as incompetent, as being secondary evidence—of being in part secondary evidence, no foundation having been laid for the use of secondary evidence, as not identified, and we further object to the present offer for the reason that they have already been offered in evidence by the counsel as a part of the cross-examination of this witness subject to our objections then made, and we now repeat and reiterate all of the objections then made. We further object that if these letters are offered for the purpose of establishing an estoppel, that no estoppel is pleaded, and for that purpose [427—371] they are incompetent and immaterial.

Mr. HART.—I wish to give notice at this time to counsel that if the answer does not plead a sufficient

(Testimony of Thomas W. Clagett.)

estoppel that we will ask the Court to permit us to amend the answer so as to properly plead one. The answer pleading the estoppel pleads one as well as I know how to do it, and if counsel in the magnanimity of his disposition will indicate wherein it is short in that regard I will try to supply it.

Mr. HUNTINGTON.—Counsel for complainant has neither been retained nor employed by the defendant company, neither has the defendant company paid him any fees, and he shall decline to assist the counsel in preparing any amended answer and will object to the filing of any amended answer at this time.

Mr. HART.—Q. The letter-book which you have produced are copies of letters written by yourself?

A. Yes, sir.

Q. They are true and correct copies of the letters which you sent away from the City of Vale, aren't they? A. They are.

Mr. HUNTINGTON.—Objected to as leading and incompetent.

Q. Have you the originals of the letters in your possession? The originals of the letters which you wrote?

Mr. HUNTINGTON.—Objected to as leading and incompetent. [428—372]

A. I have not.

Q. These other letters which you brought in they are the originals of the letters sent you, are they?

Mr. HUNTINGTON.—Objected to as leading.

A. With the exception of the few copies which

(Testimony of Thomas W. Clagett.)

are included in those letters.

Q. And those copies were included with the originals which were put in evidence?

A. No, sir, the originals of those copies were never in my hands.

Q. These copies were sent you by whom—by the Home Office?

A. No, by Balfour, Guthrie & Company, the Agents at Portland.

Q. Your superiors there? A. Yes, sir.

Q. And the signatures to those letters which were put in is the true and correct signature of whom?

Mr. HUNTINGTON.—Objected to as leading.

A. Of Balfour, Guthrie & Company, signed generally by W. Mackenzie.

Q. Or by Mr. Martin?

A. Mr. Martin has never written me under the—

Q. I thought one was from him?

A. Possibly there might be.

Q. If it was, then it was signed by Mr. Martin?

A. It would be; yes, sir.

Q. Now, counsel for the defendant demands the right to continue in the inspection of the letter-press book now in the custody [429—373] of the Master so as to select therefrom the letters material to the defendant's contentions, and so as to put same in evidence in this case. And also make a similar request pertaining to the remaining original letters written by Mr. Mackenzie or by others and produced by the witness which are still in your custody.

(Testimony of Thomas W. Clagett.)

Mr. HUNTINGTON.—Counsel for complainant objects to the examination of this correspondence last demanded and declines to permit counsel to examine same.

Mr. HART.—The defendant asks the Master to order, or to permit me to examine those papers.

Mr. HUNTINGTON.—I object to it.

SPECIAL EXAMINER.—The Special Examiner declines to permit counsel for defendant company to examine the correspondence alluded to above, but will hold same and forward them entire among other exhibits in the case to the Court for the Court's action.

Mr. HART.—The defendant company now offers in evidence all of the letters contained in the letterpress book and all of the original letters furnished by this witness and which are in the custody of the Master.

Mr. HUNTINGTON.—Counsel for complainant company objects to the introduction of this correspondence as incompetent, for the further reason that the correspondence contains the correspondence between the agents of the principal corporation, its attorneys and others, and contains confidential records. [430—374] pertaining to the business of the corporation which are foreign to this case and to the issues therein contained. Counsel for complainant now states that if counsel for defendant will designate any particular letter or letters which it desires to offer in evidence, designating them so that letters which pertain exclusively to the issues

(Testimony of Thomas W. Clagett.)

of this case and nothing else—

Mr. HART.—Owing to the objection raised by counsel in so far as it applies to letters of advice given by the counsel of the Eastern Oregon Land Company to plaintiff, or to letters asking for such advice from the company and addressed to the attorneys, whilst we have the right, yet by courtesy we will waive that right. It is impossible for defendant's counsel to point out the letters in compliance with counsel for complainant's offer. You have made your offer impossible of meeting. It is to meet that offer and to put in only letters material in this case that we request an examination of the papers. We ask you to produce all the letters pertaining to this defendant company and pertaining to its work in the development of its properties on Willow Creek. Will you do that?

Mr. HUNTINGTON.—No, sir.

Mr. HART.—It is because of your refusal that it becomes necessary to put them all in evidence, though it uselessly burdens the records. We offer them now in evidence and, Mr. Davis, of course, when you transcribe the record you will have to transcribe all of them.

Mr. HUNTINGTON.—We object to the offer for the reasons heretofore stated. We decline to agree that such letters be transcribed in the record as regards the unread letters.

Witness excused. [431—375]

[**Testimony of C. M. Foster, for Defendant.**]

C. M. FOSTER, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Judge WEBSTER.)

Q. You live at Baker City, Mr. Foster, now?

A. Yes, sir.

Q. What is your business?

A. Surveyor and civil engineer.

Q. How long have you been engaged in that profession or occupation? A. Fifty years.

Q. How long have you lived in Oregon?

A. I have lived in Baker county forty-seven years.

Q. Have you followed the profession of civil engineering and surveying at all times since you have been there? A. Well, most of the time.

Q. Well, you are now county surveyor up there?

A. Yes, sir.

Q. You are acquainted, I suppose, in Malheur county, are you, pretty well? A. I am.

Q. Do you know where the Willow Creek valley is? A. I do.

Q. And do you know where the dam is being constructed by the defendant company up on Willow Creek in section 27 or 28 or both of them—do you know where that is? A. Yes, sir.

Q. You are well acquainted with that country, Mr. Foster? [432—376]

A. I have been over it frequently.

Q. And with the whole of Willow Creek valley?

(Testimony of C. M. Foster.)

A. Yes, sir.

Q. Do you know Mr. Leonard Cole?

A. I do.

Q. Did you make some surveys of mining ditches and mining claims up in near where the defendant company's dam is; that is to say, in Section 27, or 28, or 21, Township 14 South, Range 42 East?

A. I did make surface location of placer mining ground, and also of ditches for Mr. Cole in that vicinity.

Q. When was that done, Mr. Foster, do you remember?

A. To the best of my recollection about 1894 that I was there first for him.

Q. Did you survey out some ditches at that time and locate some ditches?

A. I would not say I surveyed the ditches at that time, but I think I located the ground at that time and the second visit I surveyed the ditches, I think.

Q. When was the second visit?

A. Oh, it was a year or two after the first. I disremember the year; it was a year or two after the first visit.

Q. And then the next visit would be in 1895 or 1896? A. Yes, sir, somewhere along in there.

Q. And one or the other of these times, either the first or second visit, you located or made the surveys of some mining ditches? A. Yes, sir.

Q. How many?

A. Two. I extended an old ditch on the west side of Willow Creek and ran a new line on the east

(Testimony of C. M. Foster.)

side of Willow Creek. [433—377]

Q. The west—that is the left-hand side as you go up?

A. Yes, sir, the right bank of the creek—the right bank of the creek is the right-hand side going downstream.

Q. How far did you extend that ditch, the one on the left-hand side, I mean, as you go up the stream?

A. I could not say exactly, but I should judge it was between a quarter and a half a mile.

Q. And how far down did the one on the east side of the stream—

Mr. HUNTINGTON.—He stated the one on the right-hand side of the creek. The westerly side how far?

WITNESS.—Between a quarter and a half a mile to the best of my recollection.

Q. Did you notice—I suppose you noticed the character of the country and what it had been used for, if anything, when you was up there—at least what industry had been carried on there?

A. There had been placer mining operations *had been* conducted there for a good many years.

Q. Do you know that by any other way than by the indications on the ground? Did you know that of your own knowledge, Mr. Foster?

A. No, I wasn't there when the mining was being done. I know by hearsay, but the evidence on the ground showed what had been done and there was the ditches and worked-out ground, and it showed for itself.

(Testimony of C. M. Foster.)

Q. And you surveyed out some mining claims, or mining locations the first or second time you was up there? A. I think the second time.

Q. For Mr. Cole or somebody else?

A. I don't recollect all the members; I recollect Mr. Cole; he was the man who employed me to go there. I don't know who [434—378] was associated with him.

Q. Was that the first time you made any surveys of mining claims or ditches when you went up there in 1894?

A. I think so, to the best of my recollection.

Q. You say you are pretty well acquainted with the character of the land there where the defendant's dam is located? Tell us what kind of land it is; what kind of country it is, in a general way, if you please.

A. Well, Willow Creek flows through a canyon there. I suppose that canyon from the bottom of the creek to the top of the bluff is probably three hundred feet. The bluffs are higher than the bottom of the creek by three hundred feet. The creek bottom itself is, oh, in some places it will go seventy-five feet, sometimes a hundred or two hundred feet wide, and then the bluffs rise abruptly on either side and are rocky and the bottom is rocky. It is what we call a canyon in places. The front of these bluffs fronting the creek on either side are rocky.

Q. Of course, you don't know anything about the actual value of that, I suppose, as a mine?

A. No.

(Testimony of C. M. Foster.)

Q. Outside of its value as a mine what is that land worth, if anything?

A. Nothing only for pasture.

Q. Does it raise any pasture so far as you know?

A. Well, there would be a little grass there amongst the rocks.

Q. When—what time of the year?

A. Early in the season; when the season advances it dries up.

Q. What do you think that land is worth, Mr. Foster?

Mr. HUNTINGTON.—Objected to as incompetent. [435—379]

Q. From your acquaintance with that land the general country?

A. There is no definite value to be placed upon it. Under certain circumstances it might have a value. If a man had a ranch he might use it for pasture. That land by itself would not be worth scarcely anything, four bits or a dollar at the outside.

Q. An acre, you mean?

A. Yes, sir, per acre.

Q. Were you employed by the defendant company to make some examination of the complainant's lands in this case, and to survey Willow Creek as it runs through certain sections of their land, and to measure and determine the amount of overflowed lands, if any? Were you employed in that capacity, Mr. Foster?

A. I was.

Q. Last February, wasn't it?

(Testimony of C. M. Foster.)

A. Yes, sir, this year.

Q. Did you make such a survey and examination under that employment? A. I did.

Q. Did you make maps or plats of those sections of land and notations showing the course of the creek through them and the amount of the overflowed lands, if any? A. I did.

Q. And other information? Will you take this paper, Mr. Foster, if you please? (Counsel hands witness paper.) I will call your attention to Section 3, Township 15 South, Range 42 East, Willamette Meridian. Is the plat which you have there the one you made at the time, showing the result of your examination there? A. It is. [436—380]

Q. What part of that section is touched by the river?

A. The northeast corner of the section.

Q. Is that shown on the plat you have made?

A. It is shown.

Q. Correctly shown?

A. It is correctly shown.

Q. Tell me what the height^h of the bank there is from the creek?

A. At the top of the bluff it is about three hundred feet, I should judge.

Q. Well, is there any bottom land there at all?

A. Not to amount to anything—nothing to cultivate.

Q. We offer this plat made by the witness in evidence and ask that it be marked Defendant's Exhibit "A."

(Testimony of C. M. Foster.)

I will call your attention to Section 11, Township 15 South, Range 42 East, and ask you if you made a plat of that section showing the Willow Creek as it runs through the section?

A. I did.

Q. Made by you at the time or shortly afterward, at the time the survey was made? A. Yes, sir.

Q. And made from actual survey upon the ground, was it? A. Yes, sir.

Q. And the creek actually crosses the section as shown on the plat you prepared? A. Yes, sir.

Q. What is the character of the land there through which the creek runs in that section?

A. A canyon; narrow, rocky canyon. [437—381]

Q. Is there any land that can be cultivated there at all? A. No, sir, very little, if any.

Q. None that is overflowed? A. No, sir.

Q. How high are the banks of the bluffs on the sides there? A. Oh, two or three hundred feet.

Q. We offer in evidence the blue-prints of the plat referred to by the witness in section 11 and ask that it be marked Defendant's Exhibit "B."

I will call your attention to Section 31, Township 15 South, Range 43 East. Did you make an examination of that section? A. I did.

Q. Did you make a plat showing the land and the course of the creek through the land?

A. I did.

Q. Is that course of the creek as it flows through the land correctly shown? A. It is.

(Testimony of C. M. Foster.)

Q. There is some other memorandum on the plat showing certain information respecting the width of the creek, tops of the banks, and so on. Did you put them all on there at the time? A. I did.

Q. Tell, me, Mr. Foster, how wide are the banks of the creek there through that section—I mean how wide apart?

A. Ninety feet wide at the top, of the bank.

Q. And how high are the banks?

A. Twenty feet on the north line of that section.

Q. The banks are twenty feet high on the north line of that section? A. Yes, sir. [438—382]

Q. Twenty feet how, above the water?

A. Above the water.

Q. At the time you were there?

A. Yes, sir.

Q. And there was water in the creek at the time you were there, in February?

A. Yes, sir, quite a stream; from eight hundred to a thousand inches when I was there.

Q. How does the water flow through there, pretty rapidly? A. Yes, sir; it has a good fall.

Q. How many feet to the second?

A. Oh, at least three feet to the second; that is a conservative estimate.

Q. And the banks were twenty feet above the water at that time. Did you measure them?

A. I did.

Q. What is the character or nature of the ground around there up on the banks?

A. Sagebrush, high and dry, the banks are and

(Testimony of C. M. Foster.)

covered with sagebrush.

Q. Well, did you examine the land there with reference to ascertaining if possible whether there had been any overflow of the water of the stream to affect the land adjacent to the banks?

A. I did, and here is the result of it. I appended it to the plat of Section 31.

Mr. HUNTINGTON.—Was that memorandum *made yourself at the time*?

A. Yes, sir, and I made this plat from the memorandum I made on the ground.

Q. Is that true with these plats?

A. Yes, sir. [439—383]

Q. These memorandums are from the data made by you at the time as a result of the examination?

A. I did. I made this memorandum regarding Section 31. North boundary of Section 31 the height of the banks above Willow Creek are twenty feet above the water in the creek. The width of the water in channel 20 feet.

Q. That is to say the stream of water flowing in the creek was 20 feet wide?

A. Yes, sir. The top of the creek banks are ninety feet apart. That is the width of the channel on top.

Q. And now, the ground was what character?

A. Now, follows this: "Ground high and dry; vegetation on the west of creek sagebrush.

Q. The west—well that would be the left-hand side going up?

A. No, the right-hand side going up, the west

(Testimony of C. M. Foster.)

side of the creek. The creek, you might say runs northerly and southerly—up the left-hand side going up.

Q. That would be the left-hand side going upstream? A. Yes, sir.

Q. Does that sagebrush come right up to the bank?

A. Yes, sir, it comes right up to the bank.

Q. Is there any difference in the sagebrush growing along the bank of the creek and the sagebrush growing off a distance from it?

A. No, sir, it is all the same.

Q. Now, go on and tell us anything else?

A. Ground high and dry; vegetation on the west side sagebrush. And, on the northeast quarter of the section is an alfalfa field irrigated from a ditch extending along the foothills on the east side of the valley.

Q. Now, that is on the right-hand side of the stream as you go up? [440—384]

A. Yes, sir.

Q. And the irrigating ditch, or the ditch supplying the water to irrigate that *sagebrush* (alfalfa(?)) field runs along the foothills on the right-hand side of the valley going up? A. Yes, sir.

Q. Do you know where that ditch comes out of the creek, Mr. Foster? Do you know anything about that?

A. No, but it is away up above—miles above. I do not know at what particular point it leaves the creek.

(Testimony of C. M. Foster.)

Q. Well, it comes up several miles above you would say?

A. Yes, sir. The wagon road follows along and you can trace it for miles up and down the valley there—the ditch.

Q. You have told us about the banks on the north boundary of the section, now on the east, what have you to say about the banks there, what are their height*h*?

A. The bank of the creek on the east side twenty feet; vegetation, rye grass and sagebrush.

Q. Well, how about the width of the banks there? Did you measure that, Mr. Foster, down below?

A. No, if I did I did not put it down here.

Q. Do you now have any recollection about it?

A. No, but I think about the same width—the top of the bluffs down there—that they were the other side of the section.

Q. You say that the vegetation was rye grass and sagebrush? A. Yes, sir.

Q. Do you mean rye grass mixed in with sagebrush? A. Yes, sir.

Q. Growing right up the banks of the stream?

A. Yes, sir; stools of rye grass mixed in with sagebrush and growing there.

Judge WEBSTER.—We offer that plat in evidence and ask that it be [441—385] marked Defendant's Exhibit "C."

Q. I will call your attention now—you speak about measuring the width of the stream, the banks and the height*h* of the banks. How were the meas-

(Testimony of C. M. Foster.)

urements made?

A. They were made with a hundred-foot steel tape.

Q. Carefully and accurately made, were they?

A. Yes, sir.

Q. I will call your attention now to Section 5, Township 16 South, Range 43 East. You made an examination of that section, Mr. Foster?

A. I did.

Q. And made a plat of it the same as the others?

A. Yes, sir.

Q. Which shows the course of the stream on that section? A. Yes, sir.

Q. What are the width of the banks of the stream on the north boundary line of the section?

A. The banks of the north boundary of the section are 12 feet above water; the width between the banks of the creek on top is 90 feet. The width of the water in the channel is 18 feet.

Q. Was that at the time you were there, the water was running through that creek in the channel 18 feet wide—18 feet of water? A. Yes, sir.

Q. And the banks were 12 feet above that water and at the top were 90 feet apart?

A. Yes, sir.

Q. Now, what was the condition on the east side of the section with reference to the width of the banks and the height and the water and so on?

A. The banks on the east side of the creek where the creek leaves [442—386] it were four feet above the water and the width of the water in the

(Testimony of C. M. Foster.)

channel was 14 feet.

Q. Well, do you remember what the width of the banks were?

A. The banks were pretty nearly vertical there.

Q. Was there any overflowed land on that section—well, was there any land overflowed at the time you were there? A. Yes, sir, a little.

Q. And was there indication of more having been overflowed at other times or not?

A. Yes, sir, the water had been a little higher than when I was there.

Q. How did you determine that fact in your own mind?

A. Well, we measured along on the north side and then down southeasterly along the outside of the surface that had been covered with water.

Q. Could you see as indicated upon the ground where the surface had been previously covered with water? A. Yes, sir, very plainly.

Q. Now, you could not tell by examining that what years or when it had been covered with water, I suppose, or could you?

A. Well, yes, sir, because the same freshet was still on when I was there and had undoubtedly been higher and covered this extra ground. The creek was falling when I was there.

Q. It had been higher? A. Yes, sir.

Q. How much overflowed land on that section that had been overflowed at some time previously did you find there?

(Testimony of C. M. Foster.)

A. I estimated about 15 acres that had been overflowed.

Q. You say you "estimated" it; did you measure it?

A. Yes, sir, we measured it on two sides. It was not what we would call an accurate measurement, but it was a close approximation. [443—387]

Q. But not to a fraction? A. No, sir.

Q. What would be the extreme minimum, do you think, taking into account the fact this is, as you say, somewhat of an approximation?

A. What would be the maximum area?

Q. Yes, sir, and the minimum?

A. I estimated what had been covered with high water 15 acres that year—this present year.

Q. Now, taking into account all that had ever been overflowed at some other time?

A. That is something you cannot tell. You cannot go up there to-day and tell what lands have been overflowed and what has not. I went by the ground I could see had been overflowed when I was there this last spring.

Q. Now, you say you cannot tell by looking at that whether it had been overflowed other years?

A. No, sir.

Q. Now, let me ask you if there is anything on the ground there to tell, or by which anybody could tell whether it had been overflowed one year ago, or two years ago, or ten years ago?

A. No, sir. The only way you could tell when that valley had been overflowed is to be there after

(Testimony of C. M. Foster.)

the water left, because anything left gets covered up with sagebrush, and that has been covered up this year, and it would look just the same as any other.

Q. Is there sagebrush there?

A. The sagebrush is scattering there in places where it has been overflowed, in small places, but there was more or less sagebrush. While I was there there was sagebrush and [444—388] sagebrush sticking up through the water. When the water dries off it is difficult to tell how much of that country was under water.

Q. How much of that section has been and is entirely free of sagebrush?

A. Very little is entirely free of sagebrush.

Q. How many acres would you think, Mr. Foster?

A. Oh, I suppose there may be twenty; there may be 30, possibly 40 acres on which the sagebrush is not very large, but there is sagebrush on it all but it is not all large.

Q. What character of growth is the hay made there, if any has been made—the character of the grasses?

A. The natural growth of the hay, all the hay there is there, is rye grass. That is the natural growth up and down the valley.

Q. You say here there was some hay made on the northeast quarter. There was some hay made on other parts of this land made by a ditch, is there?

A. Well, I don't know; I did not see any.

Mr. HUNTINGTON.—What section is that you are talking about now?

(Testimony of C. M. Foster.)

A. Section 5.

Q. I see by the memorandum here—did you see up on the northeast quarter of it—

A. Yes, sir, that is where I am speaking about; the hay is on the northeast quarter of the section but that land was not irrigated from the creek down there. That water they irrigate that land with came down along the foothills.

Q. You mean in a ditch?

A. Yes, sir, in a ditch that skirts along the foothills on the east side.

Q. Comes out of the river away up above somewhere? [445—389] A. Yes, sir.

Judge WEBSTER.—I will put this map in evidence of Section 5 and ask that it be marked Defendant's Exhibit "D."

Q. I will call your attention to Section 9, Township 16 South, Range 43 East. Did you make examination of that section?

A. I did the northeast quarter of it.

Q. Yes, sir. And did you locate or make a plat of it? A. Yes, sir.

Q. And which is locating Willow Creek, or Willow River, as it runs across that section?

A. Yes, sir.

Q. What are the banks there, do you remember how high they are and how wide?

A. I did not measure it. There was nothing there. I just simply located it. It runs across the extreme northeast corner of the section.

Q. Anything there indicating overflowed land?

(Testimony of C. M. Foster.)

A. No, sir.

Q. Did you notice the water in it at the time you were there?

A. Yes, sir, water all up and down the creek at the time I was there, but I don't think that my attention was called to that section particularly; that is, that quarter, but I located the creek across it all the same, across the northeast corner of Section 9. I made no memorandum as to the height of the bank or width of the channel.

Q. Have you any recollection about it now especially? A. No, I couldn't say that I have.

Q. But there is no overflowed land there? That you are sure about?

A. No, there is no overflowed land there.

Q. Do you remember what the growth on the land there is, Mr. [446—390] Foster, on that section?

A. No, I don't recollect. All that wild land has got about the same growth—sagebrush, greasewood and rye grass.

Q. Who was with you at the time you made these measurements and this examination?

A. I think a gentleman by the name of—I think Mr. Leonard Cole was along and a man by the name of Hoskins and a man by the name of Glenn. They were along.

Q. I will offer this map in evidence and ask that it be marked Defendant's Exhibit "E."

Q. I will call your attention to Section 23, Township 16 South, Range 43 East. Did you make an examination of that section? A. I did.

(Testimony of C. M. Foster.)

Q. Did you make a plat of it showing the course of the creek through it? A. I did.

Q. And did you make an examination of it with reference to determining the height of the banks and the width and course of the stream and the overflowed land?

A. Well, there was some overflowed land there. The banks are very low; in fact, the water at the stage when I was there was flowing out of the channel.

Q. And what have you to say about the channels of the creek there? Was there more than one?

A. Yes, sir.

Q. How many are there?

A. There were two. But there were other small channels, but two principal channels. I made this memorandum while I was on the ground.

Q. Well, tell us about it. [447—391]

A. On the southeast quarter of the northeast quarter of Section 16 about 15 acres of land is overflowed. The old channel of Willow Creek carries but little water. Most of the water flows through the new channel. No indications of cultivation; vegetation chiefly sagebrush, greasewood and rye grass.

Q. That is the memorandum which you made as a result of your examination at the time; that is true?

A. Yes, sir, that is correct.

Q. Now, about the land overflowed: What was the vegetation upon that land?

(Testimony of C. M. Foster.)

A. Well, the vegetation would be small sagebrush.

Q. Was there any land that was absolutely bare of sagebrush? Any extent of the land, I mean, so that you would call it an open field?

A. No, it is not destitute of sagebrush. There is more or less small brush growing over it, and then there was mud all over this part of it and sagebrush sticking up through the mud. The mud had been washed in there from the waters of the creek.

Q. Did you measure that acreage of overflowed land, Mr. Foster? A. I measured part of it.

Q. Do you think 15 acres would cover all the land overflowed when you were there? A. Yes, sir.

Q. Could you tell whether any more of the land had been overflowed in previous years *or in previous years*? A. No, sir, I could not.

Q. Was there evidence of any cultivation whatever? A. No, sir.

Q. The vegetation you say is chiefly sagebrush and greasewood [448—392] and rye grass?

A. Yes, sir.

Q. What is the character of the land all around through the country there?

A. The same thing. It is all sagebrush and greasewood principally.

Q. No clearing of sagebrush?

A. There was in this particular place (I will say this) between the new channel and the old there was a streak of willows; yes, sir, a line of willows grown up there. There were bunches of willows in there.

(Testimony of C. M. Foster.)

Q. That is between the new channel and old as marked on the plat here?

A. Yes, sir, I have marked the word "Willows" just as I found them.

Q. And through there are bunches of willows?

A. Oh, yes, sir, there were bunches of willows through there.

Q. All right, I will offer this plat in evidence and ask that it be marked Defendant's Exhibit "F"—Section 23.

Q. Was there any indications on Section 23, about which I have just asked you, to show to what extent, if any, the water had ever been over the land at any previous time?

A. I saw no signs of an overflow only the overflow that had just taken place just before I was there. The north half of the northeast quarter I did not examine as to whether it had been overflowed. It was the south half of the northeast quarter that I examined.

Q. I will call your attention to Section 25, Township 16 South, Range 43 East; and ask you if you made any examination of that section? [449—393]

A. I did.

Q. And located the channels of Willow Creek as it flows across—as it runs across that section?

A. I did. I located both channels from the northwest corner of the section.

Q. There are two channels? A. Yes, sir.

Q. One you designate the new and the other the old channel, and that is the actual difference of the

(Testimony of C. M. Foster.)

channels, is it—one is a new channel and the other is an old channel? A. Yes, sir.

Q. What are the width or height of the banks of these two channels at the north boundary of the section there?

A. The bank of the old channel was six feet above the water—above the bottom of the channel. There was no water flowing in the old channel. The *banks six* feet high on the north boundary.

Q. And the new channel?

A. The present channel the banks were eleven feet above the water. The width of the water in the creek was 12 feet.

Q. How wide were the banks across at the top? Do you remember whether they were wider than the water?

A. Yes, sir, it was wider than the water, but they were nearly perpendicular. I don't think I have the width down.

Q. You did not measure that, I guess?

A. If I did I forgot to put it down.

Q. But the widths and heights and measurements you have here were actually made as were those awhile ago? A. Yes, sir.

Q. Now, on the east side of the section where it leaves the section what are the heights of the banks there above the [450—394] water?

A. Eleven feet above the water.

Q. What is the width of the water?

A. Thirty feet. That is above Scott's dam.

Q. Does Mr. Scott have a dam in there?

(Testimony of C. M. Foster.)

A. Yes, sir, just below, and his dam held the water back and that is what made it so wide. It was back-water from his dam.

Q. Is the head of his ditch located on this map?

A. Yes, sir.

Q. Where is the head of his ditch?

A. It takes water out right at his dam in his ditch.

Q. And that is indicated by the written words here "The head of Scott's ditch"? A. Yes, sir.

Q. Was there any overflow of the creek on Section 25? A. No overflow.

Q. Was there any indication that there ever had been any overflow? A. No, sir.

Q. What is the character of the vegetation on that section?

A. All sagebrush and greasewood and rye grass.

Q. How is it along the banks of the creek with reference to what it is back from the creek?

A. Just the same.

Q. Was there any part of the section where ground had apparently been mowed?

A. Yes, sir.

Q. Where was that?

A. On the northeast corner of the section—the extreme northeast corner. It looked as if it had been mowed some time.

Q. Was there any hay there? I see you have noted here a little [451—395] stack of rye grass hay.

A. Yes, sir, a small stack of rye grass hay.

Q. When you were there there was none of the

(Testimony of C. M. Foster.)

land overflowed at all? A. No, sir.

Q. And the water was not within twelve feet of the top of the bank—eleven feet?

A. Eleven feet.

Q. The water was not within eleven feet of the top of the bank anywhere through there?

A. No, sir; it was all high.

Q. All right. I will offer that blue-print in evidence and ask that it be marked Defendant's Exhibit "G."

Q. I will call your attention to Section 31, Township 16 South, Range 44 East: Did you examine that section?

A. I did the northeast boundary of it.

Q. Did you make a map of that section showing the course of the creek across the section?

A. I did.

Q. That is correctly shown, is it?

A. It is.

Q. What is the height, or what was the height of the bank above the surface of the water in the creek as it was when you were there on the north boundary?

A. It was eleven feet above the surface of the water in the creek—the bank was.

Q. How wide was the creek?

A. Twenty feet.

Q. Did you measure the depth?

A. No, I did not. [452—396]

Q. Can you give me an idea of how deep it was?

A. Yes, sir, I can give an idea.

(Testimony of C. M. Foster.)

Mr. HUNTINGTON.—Objected to as incompetent if he did not measure it.

A. We crossed it there with a wagon, that is the only way I could judge. I would judge the deepest place the way it wet the wagon wheels it would be about fourteen or 16 inches, the deepest part.

Q. But the height of the banks you measured, you know that is eleven feet above the water?

A. Yes, sir.

Q. And also that the creek was twenty feet wide?

A. Yes, sir.

Q. How wide was it between the tops of the banks of the creek at that place?

A. I have not got that down here. I don't know whether I measured that.

Q. It is on here?

A. "Between the top of the banks of Willow Creek 90 feet."

Q. That memorandum of that is on this plat, isn't it?

A. Yes, sir.

Q. And was all put there as a result of your examination?

A. It was.

Q. From memorandum made by you at the time?

A. Yes, sir.

Q. And is correct?

A. Yes, sir.

Q. What evidences of overflow did you see there that there ever had been any overflow, if any?

[453—397] A. None.

Q. There was no overflow?

A. It was all high and dry and there was no

(Testimony of C. M. Foster.)

chance for overflow.

Q. Sagebrush growing all along there?

A. All along.

Q. On the banks of the creek?

A. Clear up to the banks. The banks was high and dry and there was no chance for any overflow.

Q. I will offer this map in evidence and ask that it be marked Defendant's Exhibit "H"—Section 31.

Q. Were you employed to make an examination of some of the complainant's land just a few days ago, Mr. Foster? A. I was.

Q. Did you make such an examination?

A. I did.

Q. And did you make plats of and showing the result of the examination made? A. I did.

Q. I will call your attention to Section 5, Township 17 South, Range 44 East. (I am going to ask that this be offered and substitute blue-prints of them, and ask Mr. Foster to forward the blue-prints.) I hand you plat of Section 5, Township 17 South, Range 17 44 East, and ask you if you made that map? A. I did.

Q. And of the stream, and— A. I did.

Q. That plat correctly shows the Willow Creek through that section? A. It does.

Q. What is the width of the banks on the north line of that [454—398] section? Have you got that there?

A. No, I have it in a memorandum. It was about four feet, the height of the bank on the north of the section.

(Testimony of C. M. Foster.)

Q. Did you make a measurement of it?

A. I did.

Q. Have you got that?

A. It is down in my book at the hotel.

Q. I want that. And you made measurements of all that you examined down there, did you?

A. Yes, sir, nearly all of them.

Q. And you have the memorandum of those measurements in the book?

A. I think I have it down in the hotel.

Q. I will offer that in evidence and ask him some questions about it afterwards, and ask that it be marked Defendant's Exhibit "I."

Q. Is there any overflowed land on Section 5 that you could see?

A. No indication of any. There is a channel breaking out there in a southeasterly direction that shows water flowed there some time. But everything was dry when I was there yesterday.

Q. Was there any indication on the ground you could see which showed that any of the land had at some time been overflowed?

A. No, sir, no indication of an overflow there.

Q. What is the character of the vegetation?

A. Sagebrush and the land is dry.

Q. Any indication of any of it having been mowed or cut for hay?

A. No, sir, not on the south side of the creek there ain't.

Q. Now, I wish you would tell me—returning again to the examination you made in February

(Testimony of C. M. Foster.)

when there was water in the [455—399] stream, generally speaking, what is the flow of the stream? Is it a pretty rapid flow or a very sluggish flow?

A. When there is water in it it has got a good strong current. Of course, it is crooked but it has a very strong current when there is water in it of any quantity to flow.

Q. I will call your attention to Section 9, Township 17 South, Range 44 East. Did you make an examination of that section? A. I did.

Q. When was that examination made?

A. Day before yesterday.

Q. At the same time you made examination of Section 5, to which I called your attention a little bit ago? A. Yes, sir.

Q. You made a plat of that? A. I did.

Q. That is the plat you have in your hand?

A. Yes, sir.

Q. Is Willow Creek correctly shown as it flows across that section?

A. It is. It was tied in from two different corners of the section.

Q. Can you tell me the width of the stream as it flows through there from the memorandum on that plat you have?

A. No stream flowing there now.

Q. But the banks—the width of the banks of the creek?

A. Yes, sir. There was a creek there. I measured it under a bridge and it was 18 feet in width, the channel there, and nine feet high.

(Testimony of C. M. Foster.)

Q. Well, is that the uniform height and width of the banks as it flows through there?

A. No, the banks would be farther apart. I measured under the [456—400] bridge. When you get above or below the bridge the creek is wider—above and below.

Q. How are the height of the banks above and below the bridge?

A. About the same—nine feet.

Q. What is the character of the vegetation?

A. Sagebrush and greasewood.

Q. Was there any overflow or any indication of any overflow there? A. Oh, no.

Q. How does the vegetation along the banks of the creek differ from that adjacent to it?

A. No, it is all the same; the land is all high and dry.

Q. I offer that in evidence with the understanding we are to substitute blue-print for it and ask that it be marked Defendant's Exhibit "J."

Q. I will call your attention to Section 15, Township 17 South, Range 44 East, and ask you if you made an examination of that section?

A. I did.

Q. At the same time you examined the others?

A. Yes, sir.

Q. Did you make a plat of it? A. I did.

Q. Is that it you have in your hand?

A. Yes, sir.

Q. Does that plat correctly show the location of the creek on that section? A. It does.

(Testimony of C. M. Foster.)

Q. What is the width of the channel of the creek there? [457—401] A. Fifteen feet.

Q. On the bottom or top?

A. On top and six feet on the bottom.

Q. What are the height of the banks?

A. Five feet.

Q. Was the channel pretty uniform in width as it flows across there or not?

A. Sometimes it was narrower and sometimes it was wider.

Q. How about the height of the banks?

A. The banks were high all along as where I measured it and that was five feet.

Q. How about the vegetation?

A. It was sagebrush.

Q. Does the vegetation differ off from the banks as on the banks? A. It was just the same.

Q. Any indication whatever of any overflow of that creek there at any time?

A. No, sir, everything dried and parched up and no indication of overflow that I could see.

Q. Any indication of hay having been cut there?

A. No, not cut, but there was some stools of rye grass scattered around.

Q. There were some stools of rye grass scattered around in the sagebrush?

A. Yes, sir, the whole country is covered with sagebrush.

Q. We offer that in evidence and ask permission to substitute blue-print and ask that it be marked Defendant's Exhibit "K."

(Testimony of C. M. Foster.)

Q. I will call your attention to Section 23, Township 17 South, Range 44 East. Did you make an examination of that section? [458—402]

A. I did.

Q. At the same time that you made the others?

A. Yes, sir.

Q. You made a plat of it? A. Yes, sir.

Q. Showing the course of the creek across the section? A. Yes, sir.

Q. That correctly shows the course of the creek, does it? A. Yes, sir.

Q. Did you make any measurements of the width of the channel and the height of the banks?

A. No, I did not in this case. Well, I did take some measurements too but Willow Creek along where it crosses this section in question this is a different vegetation and the land is lower and the channel of the creek is shallower; that is, lower from the top of the bank to the bottom of the creek it is lower than on the sections above and the vegetation is a good deal different. And most of the northeast quarter of the section is covered with salt grass and a portion of the northeast quarter of the northwest quarter has considerable salt grass on it. And the northeast of the southeast has salt grass.

Q. Well, what indications are there of overflow on that section?

A. No indication at all that I could see. It may be overflowed but the surface did not show it. As I say there is salt grass and that did not indicate overflow. If it had been you would not find that salt

(Testimony of C. M. Foster.)

grass, it would not be there.

Q. Are you familiar with salt grass in this country? Q. I am.

Q. Is that a grass that will grow where the land is wet or [459—403] overflowed?

A. It would not grow where it was overflowed. Temporary submergence will not kill it but frequent submergence will. If it was annually overflowed it will kill it. It does not want floods.

Q. Is that any indication of alkali too?

A. Yes, sir. It never grows only in alkali soil, salt grass doesn't, never.

Q. Is that a good soil generally?

A. No, sir, it is not a good soil.

Q. Salt grass is not a good indication of good, healthy, thrifty soil?

A. No, sir, it is only used for pasturage in our valley.

Judge WEBSTER.—We will offer that plat in evidence with permission to substitute blue-print and ask that it be marked Defendant's Exhibit "L."

At the hour of 5:10 o'clock P. M., July 24th, 1909, adjourned until 7:00 o'clock P. M. to-day.

At the hour of 7:00 o'clock P. M., July 24th, 1909, met pursuant to adjournment as above. Present: Same as before. [460—404]

Cross-examination of C. M. FOSTER by Mr. HUNTINGTON.

Q. How long did you say you had been a civil engineer?

(Testimony of C. M. Foster.)

A. Since I have been 18 years old; I am now seventy-three.

Q. When you surveyed the placer claims in 1894 what did you do in the way of making the survey? That is, how did you make the survey?

A. Set up the sections into legal subdivisions of ten acres where necessary; surveyed out the ten-acre tracts and two ten-acre tracts constitute a mining claim of placer ground.

Q. There was no one there mining at that time, as I understood you? A. I think not.

Q. When surveying the ditches a year or two later was anyone mining at that time?

A. It rather occurs to me there was some of his men at work—some of Mr. Cole's men, but I would not be certain.

Q. They were not using any water? The ditches were not any of them running water?

A. They were not using water through the ditches.

Q. The ditches you worked on were old ditches which had become more or less filled up and obstructed?

A. Yes, sir, the one on the west side. The one on the east side was new.

Q. There was no water running in it?

A. No, sir.

Q. Was there a ditch on the east side at the time you went there, or did you run the line for the ditch?

A. There was an old ditch on the east side, but the ditch I ran [461—405] on the east side was

(Testimony of C. M. Foster.)

below the old original ditch.

Q. The old ditch was not made use of?

A. No, sir.

Q. Do you remember the old Boswell cabin that was in the canyon? A. I do.

Q. That was about opposite the place that you was where the mining—where part of the mining had been done, wasn't it?

A. Yes, sir, there had been quite—Oh, I suppose there had been two or three acres mined out near the west of that old house; a little south of west, and then above, up toward the mouth of Basin Creek there had been a good deal of work done.

Q. Do you remember in making your surveys of the Rocky Butte that stands there in the canyon—a high, rocky promontory or point?

A. Immediately south of Lost Watch Gulch, do you mean?

Q. I don't know the name of the canyon.

A. There is a high, rocky hill that luffs out immediately south of the mouth of Lost Watch gulch.

Q. About how far south is that of where the cabin stood?

A. This I speak of is away above it.

Q. Do you remember one below there?

A. Yes, sir; I remember one just below the bend in the creek where all that mining had been done was right in the elbow of the creek. Just below that elbow and on the left-hand side going down to the butte that was below where they had been mining.

Q. That was below where they had been mining?

(Testimony of C. M. Foster.)

A. Yes, sir, that was below.

Q. Did you run any lines on the westerly side of the creek on the ditch that was there? [462—406]

A. The ditch lines, do you mean, or the section lines?

Q. The ditch line.

A. Yes, sir, the ditch I extended was on the west side of the creek—that I extended the survey.

Q. How far did you extend it?

A. Between a quarter and a half a mile below there. That is my judgment, yes, sir.

Q. Where it ended before, or where you began your survey there was a spillway, was there, down to the creek from the end of it?

A. I think there was on near the end.

Q. Either at the end or a little above the end?

A. Yes, sir, somewhere in there I think there was a spillway where the water had run down and washed out a little gully.

Q. Were you ever up there after that time?

A. Yes, sir, I have been there two or three times since, but it has been a long time since.

Q. How long is it since you were last there?

A. Well, I have been on the upper end of this ground I surveyed, that placer ground, I was there two years ago. That was up at the mouth of Long Basin Creek.

Q. You think that was above it?

A. No, I think that must be on Seventeen.

Q. That would be farther up the creek than Twenty-one?

A. Yes, sir.

(Testimony of C. M. Foster.)

Q. Were you ever down on any part of Twenty-seven or Twenty-eight after you did the surveying on the ditches?

A. No, I think not. I do not recollect of being down there since that time.

Q. Did you ever go from this old cabin—the Boswell cabin—down the channel of the creek to the valley, where it opens [463—407] out into the valley? A. The head of this valley?

Q. Yes, sir?

A. Yes, sir, I have been clear through that canyon.

Q. That must have been then after you surveyed the ditches?

A. No, I was down through that canyon for Baker County long before I surveyed the ditches.

Q. Did I say “after”? A. Yes, sir.

Q. I meant before. A. Yes, sir.

Q. That was before you surveyed the ditches?

A. Yes, sir.

Q. And your statement about the condition of the bluffs there is that from your recollection of the time you went through there, or have you gone recently into the canyon to examine the bluffs?

A. Oh, I have been up from the lower end of that canyon; I have been up that canyon about a mile and a half or two miles since.

Q. When was that?

A. I was there last spring the last time.

Q. In February?

(Testimony of C. M. Foster.)

A. In February, I think, in the lower end of the canyon.

Q. How far up did you go then?

A. I think I was up through to Section 3. My recollection is—Oh, I think two miles or such a matter, up the canyon.

Q. Those bluffs are broken more or less on the sides, aren't they, with gulches and side canyons coming into them?

A. Oh, yes, sir, dry sags, coming down along different places.

Q. A person owning adjacent land to that land in Section 27 and [464—408] 21 would find that land valuable for pasturage purposes if he had access to the creek and the right to use the water of the creek for watering stock?

A. Yes, sir, it would make a pasture.

Q. And it would be much more valuable for pasturage purposes with the water than if the water was not accessible?

A. It would not be worth a cent for stock without water. Take the water away and it would not be worth anything.

Q. Were all the measurements which you made and from which you prepared these plats made with the steel tape? A. Yes, sir.

Q. Who assisted you in making the measurements? I mean, who carried the other end of the tape?

A. I think sometimes one man and sometimes another.

(Testimony of C. M. Foster.)

Q. Did you carry one end yourself?

A. Yes, sir.

Q. I see on some of these plats you have written the words "Eastern Oregon Land Company" and some you have not. Did you have anything in mind in leaving it off of some, or was that just happenstance?

A. No, I think Judge Webster gave me the numbers of those different sections in the different townships and the name of the Eastern Oregon Land Company, I think he told me which ones he told me to put that on.

Q. What about Section 3, Township 15 South, Range 42 East?

A. That is away up the canyon? I don't know whether he gave me that or not. It is an odd-numbered section.

Q. This notation on here of "Eastern Oregon Land Company" is simply because Judge Webster indicated to you that they owned the land?

A. That is it. [465—409]

Q. You did not undertake to examine the records or verify that? A. No, I did not.

Q. Then the fact that you did not make the notation on Section 3 does not—you did not intend to indicate that the Eastern Oregon Land Company did not own that section?

A. No, if I had labored under that impression I would not have gone on the section at all.

Q. Now, in making these measurements with respect to the overflowed land, you made, as I under-

(Testimony of C. M. Foster.)

stand you, simply measurement of the land which had been overflowed during that—within a few days of the time you were there?

A. Yes, sir.

Q. And no other land? A. No, sir.

Q. You did not undertake to extend your survey back to include any lands which would be overflowed if the creek through these sections was two or three feet above the level of the banks?

A. No, no, no, sir.

Q. Your examination of the tracts was confined then to the land right along the banks of the creek, was it, the land you measured?

A. Yes, sir, and those lands which showed overflow. I was sent there to ascertain how many acres of land was overflowed on each of those sections.

Q. Did you know anything about whether the stage of water in the creek at the time you made these measurements was the usual stage of water at that period of year or not? Could you tell about that?

A. It had been a little higher than before I was there; it had been still higher there. [466—410]

Q. But do you know whether the highest water during the spring of 1909 was as high as the highest water in the ordinary seasons in that locality?

A. No, I could not say.

Q. You could not say? A. No, sir.

Q. Isn't it true, Mr. Foster, that where land is overflowed annually, or practically so, and the water stands upon the land for from one to six weeks that the sagebrush will be killed out ordinarily?

(Testimony of C. M. Foster.)

A. Yes, sir, sagebrush will give signs and indications of a flood.

Q. Greasewood will stand considerably more water than sagebrush?

A. Well, you never see sagebrush growing in the water, or greasewood either. Temporary submergence by water either of greasewood or sagebrush would not kill it, but if the water stands for any length of time it would kill either of them.

Q. Do you know whether sagebrush or greasewood is more sensitive to water?

A. Well, I think the sagebrush is.

Q. This measurement on Section 5, Township 16 South, Range 43 East, is made just the same as the other measurements; that is, the water that had submerged the land within a few days of the time you went there? A. Yes, sir.

Q. The bottom of that creek changes from time to time, doesn't it, in depth, or could you call anything about that?

A. No, I don't think I could tell anything about that. It would have to wash out the bottom of the channel all the way up the creek. [467—411]

Q. Or else deposit sand in the bottom of the creek?

A. Yes, sir. I don't think the bottom of the creek changes much as far as the level is concerned.

Q. Now, in Section 25, Township 16 South, Range 43 East: Do you remember that section and the appearance of the land without reference to the notations you have made here on the map?

(Testimony of C. M. Foster.)

A. Twenty-three?

Q. 25, Township 16 South, Range 43 East?

A. My recollection is there was two or three channels of Willow Creek crossed that section.

Q. Was there any brush in the channels? Were they obstructed?

A. The old one seemed to have been obstructed to some extent—the old channel.

Q. You didn't see any mowed ground on that section?

A. No, not to my recollection, I did not.

Q. Well, now, in your notation, I perhaps misled you about that. "In the northeast corner of the section some of the ground has been mowed and on the northwest corner of the section stands a small stack of rye grass hay."

A. That patch that had been mowed in the northeast was away off from the creek.

Q. Now, did you notice where the hay came from that was stacked in the northwest corner?

A. I noticed; I thought it came from right there where it was stacked.

Q. Did you go clear to the stack?

A. No, within a few rods of the stack.

Q. Did you see any blue grass or red-top or other wild grass that grow up there?

A. No, I was there at that time of the year there was no [468—412] vegetation.

Q. The only grass you could discover was the old rye grass?

A. Yes, sir, last year's growth, you know.

(Testimony of C. M. Foster.)

Q. The low grounds there looked as though there had been no grass growing on them for a year or two?

A. It did not look as though any grass had ever grown there. It was all dead. What vegetation there was was dead on the ground and gave no signs of any living vegetation when we were there, it was so early in the spring.

Q. Did you notice when you were there any signs of drift, or straws, or sticks, or twigs?

A. I did.

Q. Were those old or recent?

A. They were recent.

Q. You did not see any of former years?

A. No, not from Willow Creek. I will tell you about that. There was side gulches running down to Willow Creek. Apparently year by year there would come water spouts and some of those gulches carried debris away down the gulches.

Q. When you were talking about debris that comes or is carried from water spouts, did you notice any straw or twigs?

A. Not that I noticed as coming from Willow Creek.

Q. I call your attention to Section 31, Township 16 South, Range 44 East. Did you make measurement of the channel of the creek; I mean the width and depth where it crosses out of the east line of the section?

A. I don't know as I did. Does that say anything about it?

A. No, it doesn't.

A. No, I don't think I got that. I did not tie

(Testimony of C. M. Foster.)

it in there; I tied it up there. (Indicating on map.)

Q. You did not make the measurement of just where that crosses it? [469—413]

A. No, I think not.

Q. Do you remember whether you went clear down there or not?

A. Yes, sir, we were down there.

Q. In putting in the general line if the creek through these various sections did you draw them in from any measurements or survey, or just from your recollection?

A. I tied them in. You will discover that—

Q. (Interrupting.) I am not asking about that. I am asking about the course of the channel of the creek through there.

A. I did not traverse that.

Q. You did not follow it down?

A. No, sir.

Q. You went to the corners where it went in and crossed out? A. Yes, sir, as a general thing.

Q. Then, I understand you drew this in, the creek, where it appears to cross out from your recollection?

A. Yes, sir. I went down there. I think we did not find that quarter corner so I did not locate that accurately as to the quarter corner on the east side.

Q. On Section 23 you state here in your memorandum that there are about 15 acres of land overflowed, and, in your direct examination I understood you to say that 15 acres was covered more or less with mud.

(Testimony of C. M. Foster.)

A. Yes, sir, it was, more or less, or had been.

Q. Or had been a few days before?

A. Yes, sir.

Q. Do you remember of meeting—I call your attention to Section 5, Township 17 South, Range 44 East, do you remember meeting Mr. J. D. Boggs out there that day you made that examination?

A. No. When was that, here lately? [470—414]

Q. Yes, sir.

A. No, I don't think I know him.

Q. A man that was mowing in the field there?

A. Yes, yes. He owns a place right this side on Four. Yes, sir, I met him.

Q. You asked Mr. Boggs at that time, didn't you, if there was any overflowed land in that section, referring to Section 5, and he went out and pointed out some low land which he claimed was overflowed, and you said: "I did not mean these fellows," or words to that effect?

A. No, I will tell you the conversation I had with that man. We were talking there and I was asking him about some corners and lines, and then we got to talking about the low stage of water and the high stage and what had been flooded, and he said there had been no high stage for two years, but he said he had been there three years before and he said then there had been an overflow and he pointed up the creek and to the west. The creek runs northwest off there, and he said he could stand there at the northwest of his house and see the water in that direction.

(Testimony of C. M. Foster.)

That is what he told me.

Q. The channel of the creek is quite crooked all the way down, isn't it, after it gets into the valley?

A. Oh, yes, sir, it is crooked.

Q. And in a great many places the banks have partially fallen in and more or less brush has grown in between the banks?

A. Well, in that condition it would not exist, generally speaking.

Q. Aren't there a great many places where that condition exists? A. Not a great many.

Q. Isn't there a good deal of that through Section 23, Township 17 South, Range 44 East, and also in Section 23, Township 16 South, Range 43 East, in both of these sections? [471—415]

A. No, Sixteen—that Twenty-three in Seventeen South Forty-four, those channels, the various channels there are not as deep as they are above on the creek, but, as to being obstructed, I don't know—

Q. You misunderstood me if you thought I said "obstructed." I said, had not the banks fallen in and aren't there numerous places where more or less brush had grown up between the banks of the creek down on the sides of the banks?

A. Yes, sir, that is true in quite a number of places, but that is not true in the main channel of the creek. Those old channels are grown up with brush, but in the new main channel they are not grown up that way.

Q. As the old channels become obstructed in this way then the creek forms new channels?

(Testimony of C. M. Foster.)

A. Yes, sir.

Q. And sometimes forms two or three new channels?
A. Yes, sir, that is true.

Q. Now, you speak of the salt grass down on Section 23, South, Range 17 44 East: As I understand you to say, that land was considerably lower than the other lands along the creek?

A. No, the lands are not lower but the channel of the creek is shallower.

Q. Perhaps I did not express myself correctly then. The level of the land is not as far above the bottom of the channel of the creek as in other places?

A. Yes, sir, that is what I meant.

Q. So that the creek, if it overflowed the banks of the creek above, where you was, it certainly would overflow here, would it not?

A. Yes, sir, it would. [472—416]

Redirect examination by Judge WEBSTER.

Q. I think you said when you were up there there was no mining going on at that time?

A. Not the first time I was with Mr. Cole.

Q. That is what I meant. A. Yes, sir.

Q. It was perfectly obvious there had been a great deal of mining done there?

Mr. HUNTINGTON.—Objected to as leading.

A. Well, yes, sir, acres of the ground had been worked out.

Q. You speak of a rocky butte there and I understood you to say it was below that, or at least below one rocky butte where the old mining had been carried on?

(Testimony of C. M. Foster.)

A. No, where most of that old mining was in one body that was above this rocky butte.

Q. The first one? When he first talked to you about this rocky butte?

A. Yes, sir, there was a great deal of mining above that. That is above the mouth of Lost Watch creek.

Q. And also that there was mining below that first rocky butte he called your attention to?

A. Oh, yes, sir.

Q. You think that the sagebrush will not stand as frequent and long continued overflows as greasewood?

A. No, I don't think it would. I never saw the two compared with reference to that. [473—417]

Q. Will either one of them stand a long-continued, persistent overflow? A. No, sir.

Recross-examination by Mr. HUNTINGTON.

Q. Let me get this matter of the two buttes entirely clear, or put myself in a position to clearly understand what you mean by that. The mining was both above and below the upper butte?

A. Yes, sir.

Q. But there was no mining below the butte which stood below the Boswell cabin?

A. I don't think there was but little below that butte. You can tell it better by that gulch—the Lost Watch Gulch.

Q. Where is that Lost Watch Gulch?

A. It comes in right at the upper butte.

Witness excused.

(Testimony of James O. Moudy.)

At the hour of 8:20 o'clock P. M. adjourned until 9:00 o'clock A. M., Monday morning, July 26th, 1909. [474—418]

At the hour of 9:00 o'clock A. M., July 26th, 1909, met pursuant to adjournment as above. Present: Same as before

[Testimony of James O. Moudy, for Defendant.]

JAMES O. MOUDY, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Where do you live, Mr. Moudy?

A. At the present time in Cow Valley, Malheur County.

Q. How long have you lived in Malheur County?

A. Since 1882 most of the time.

Q. Have you ever lived in what is called Willow Creek Valley? A. Yes, sir.

Q. How far is Cow Valley from Willow Creek Valley—the place where you now live?

A. I would judge about fourteen miles.

Q. You mean that Cow Valley is farther up?

A. Yes, sir. I think it would be about fourteen miles from where I live.

Q. When did you first commence living in Willow Creek Valley?

A. I think it was in the spring of 1897 I bought mine there.

Q. Whereabouts in Willow Creek Valley did you buy, upper or lower?

A. The lower valley. [475—419]

(Testimony of James O. Moudy.)

Q. Where is the land you purchased?

A. Where Brogan is situated now, at the present time.

Q. The town of Brogan—do you know the section that is in?

A. Section 24, Township 15 South, Range 42 East.

Q. How far away from the place was it where you lived—you lived right there on that land?

A. I lived right where the townsite is.

Q. You say you bought the land there in 1897?

A. Yes, sir.

Q. Had you lived there previously?

A. Yes, sir.

Q. Whereabouts?

A. On Emory Cole's place; it was J. L. Cole's place at that time.

Q. It is the same place known now as the Emory Cole place we have been speaking of?

A. Yes, sir.

Q. Where else did you live in the valley?

A. Those were the only places.

Q. During your period of residence there in the valley are you familiar with the rainy seasons and dry seasons and the flowage of water in the dry seasons? A. Yes, sir.

Q. Have you observed those during the various seasons of the year? A. Yes, sir.

Q. Is there any seasons of the year when the water flows heavier than others? A. Yes, sir.

Q. What season is that?

(Testimony of James O. Moudy.)

A. In the spring of the year or the breaking up of the river. [476—420]

Q. About what time generally does the rainy season or extra flowage of water commence?

A. About along the last of January or the first of February.

Q. What is the cause of the increased volume of water you speak of?

A. It is generally caused by the melting of the snow and rain that falls at that time of the year.

Q. Where would the rain and snow fall that would have particular effect in raising the water in the creek. A. It falls promiscuously.

Q. The particular effect would be produced by the rain that falls in the hills or mountains, or in the valley?

A. It would be the rains and snows that fall in the mountains and valley both.

Q. Is there a portion of the year that is known as the "rainy season" you might say?

A. Yes, sir, when we have more.

Q. When, about, is that when the most of the rain falls—rain or snow—just generally?

A. Yes, sir, I understand, but the snow does not generally fall the times the rain does.

Q. Just the general months through which the rain and snow falls?

A. Well, it would commence in December and I think up until May.

Q. It commences in December and lasts until May in that vicinity?

(Testimony of James O. Moudy.)

A. Yes, sir.

Q. Now, when the rain and snow falls in the mountains as a general thing, through the period of time you have mentioned, what can you say of the precipitation in the valley?

A. Something about the same, I would think, in speaking of the [477—421] mountains. The tributaries of Willow Creek equal, I think, about the same as the valleys.

Q. Have you had occasion to notice the condition of Willow Creek through the summer months of June, July and August of the various years since you have lived there? A. I have.

Q. Have you noticed at any time or made comparison of years when there would *not* be a large volume of water in the creek and years when there is not much? A. Yes, sir.

Q. Is there any difference through June, July and August, through that time, in the condition of the creek, whether a heavy fall or a small fall—any material difference?

A. I would not think in the creek there would be any material difference.

Q. Now, does Willow Creek ever overflow its banks? A. Yes, sir.

Q. About how high are the banks of the creek as it leaves up at Emery Cole's place clear on down until you get into Township 17 South, Range 44—what is the condition of the banks of the creek as to whether it heightens or lessens as it passes through

(Testimony of James O. Moudy.)

Emory Cole's place down until it leaves Township 17, Range 44?

A. I don't know where the township and range you speak of is located.

Q. Well, you know where Mr. Scott lives right between sixteen and seventeen?

A. Yes, sir.

Q. And you recall the places where Mr. Wells and Dolan and those places, where they live in Township 17, Range 44?

A. Yes, sir, I know where they live. [478—422]

Q. Now, in the vicinity of the location of those places where those gentlemen live—do you know where Brosman's place is? A. Yes, sir.

Q. That runs into seventeen. I did not have reference to the Wells nor Norwood's place. You know where Brosman's is? A. Yes, sir.

Q. Taking a view of the valley from up in the vicinity of Mr. Cole's place clear on down the creek as it passes through the valley until it gets to Mr. Brosman's place, or below, are you familiar with it in a general way? A. Yes, sir.

Q. You can state in a general way about what is the height of the banks along the stream at different places? That is, without locating the place, one place so high and so on?

A. Some places it is not very deep while others it will go 25 feet deep.

Q. You think that in some places it is 25 feet deep?

(Testimony of James O. Moudy.)

A. I never measured them but that is my judgment.

Q. And at other places it runs down lower?

A. It runs down to three or four feet in depth.

Q. Does the water of Willow Creek—is it what you might term an annual overflow, Mr. Moudy; that is, occurring with regularity so that it can be counted upon and known to come annually?

A. No, sir.

Q. Would you speak of it as a regular annual overflow, or a spasmodic overflow, occurring occasionally?

A. A spasmodic overflow, yes, sir.

Q. Now, the extent of the overflow, when it does overflow, is there any regularity as to the height or volume?

A. No, sir. [479—423]

Q. Were you in the vicinity of Willow Creek during the year, or spring months, that is, from January, February, March or April along in there for the year 1908?

A. Yes, sir.

Q. Were you in the vicinity of Willow Creek during those same months for the year 1909?

A. Yes, sir.

Q. So that you would be able to know the extent of the water in a general way coming down those years?

A. Yes, sir.

Q. Were you in the vicinity of the creek for the years 1907, 1906, and 1905 and previous years?

A. I was.

Q. What can you say as to the extent or volume of water coming down in 1908?

A. I did not notice any water, of what you would

(Testimony of James O. Moudy.)

call an overflow in 1908.

Q. The creek that year was rather small?

A. Yes, sir.

Q. What can you say of the extent of the water in 1909? A. It was very limited.

Q. Was it larger than it was in 1908?

A. It might have been a little larger. I do not know as there was much difference, but there might have been some more water.

Q. Are you familiar with the effect of the overflow water upon the tillable land, or the productive land in the valley? A. I am.

Q. You may state whether or not the land that is overflowed by the spring freshets of the years whenever it does occur, whether it is a benefit, the flow of the waters is a benefit to the [480—424] lands of the valley?

A. I considered them a detriment.

Q. You may state how the overflow of the water has generally been regarded by the inhabitants of the valley and the farmers or husbandrymen for years previous.

Mr. HUNTINGTON.—Objected to as hearsay and not the best evidence.

A. It has been the opinion of the people I have been acquainted with there that it has been a detriment and we have tried to get rid of it.

Q. You may state whether that opinion you speak of there has been a generally prevalent opinion there among the farmers.

Mr. HUNTINGTON.—Objected to as hearsay

(Testimony of James O. Moudy.)

and not the best evidence.

A. It has.

Q. You may state whether that is a general reputation of the overflow waters.

Mr. HUNTINGTON.—Objected to as hearsay and not the best evidence. Same objection to all of this.

A. It has.

Q. I understood you to say that the overflow water produced injury or damage to the lands of the valley.

A. It is an injury.

Q. Do you know of cases where the farmers living in the valley owning lands have endeavored to protect their lands from an [481—425] overflow?

A. I do.

Q. How long has that been going on?

A. It was going on when I first came to the country in 1882 and still exists.

Q. Are you acquainted with Mr. Clagett, the local agent of the complainant company?

A. I am.

Q. You may state whether or not Mr. Clagett has had knowledge of the fact that the farmers regard the overflow as an injury or damage.

Mr. HUNTINGTON.—Objected to as hearsay and not the best evidence.

A. I could not state as to that.

Q. Have you ever heard him speak of that?

Mr. HUNTINGTON.—Objected to as hearsay and not the best evidence.

A. I never have.

Q. What precautions were taken away back in

(Testimony of James O. Moudy.)

1882 when you came here or were in existence to prevent the overflow water from going on the lands?

A. There was ditches and drains to keep it off.

Q. What farmers had those ditches and drains to keep the overflow waters off their lands?

A. Mr. Cole and Mr. Richardson has, too.

Q. Mr. Cole and Mr. Richardson?

A. Yes, sir. [482—426]

Q. Do you know of any of late years that ever constructed dams or ditches to keep the overflow water from going on the land?

A. I do.

Q. Who? A. Mr. Cole and Mr. Kelly.

Q. When land is overflowed what kind of vegetation can grow upon it?

A. There is some grasses which grow on overflowed land.

Q. Would the same land be more productive if the overflow water were kept off it?

A. I think so.

Q. Are you acquainted with what is called the plant, sagebrush, in this vicinity?

A. Yes, sir.

Q. And soapwood, or greasewood?

A. Yes, sir.

Q. What effect has the overflow water on sagebrush and greasewood; that is, if the ground where sagebrush and greasewood is growing and it is submerged annually by overflow water, what effect will it have?

A. It kills it.

Q. Where you see sagebrush and greasewood growing can you tell from that whether or not the land has been regularly overflowed or inundated?

(Testimony of James O. Moudy.)

A. We judge our lands that way.

Q. If you see sagebrush and greasewood growing on the land what do you say as to whether or not it has been overflowed regularly?

A. We say that it has not.

Q. That is the history of it?

A. That is it. [483—427]

Q. The land could not be overflowed and still have the sagebrush and greasewood upon it; that is, the annual overflow?

Mr. HUNTINGTON.—Objected to as leading.

A. That has been my experience.

Q. What can you say of the land up and down Willow Creek Valley from that Township—17—up to Mr. Cole's place, as I mentioned a while ago, speaking of the land that is owned by individual farmers along the valley, what can you say of their land bordering on the creek as to whether or not it has sagebrush and greasewood upon it?

A. All the lands I know that is not under fence claimed by other parties has greasewood and sagebrush, most all of it.

Q. Do you know which pieces are "Company land"?

A. I know a few pieces, yes, sir.

Q. Scattered along up the valley?

A. Yes, sir.

Q. Are you familiar with the land of the "Company" located in Section 31, Township 15 South, Range 43 East?

A. If I could find out where it is located?

Q. Mr. Weaver has a place near to it, and Mr.

(Testimony of James O. Moudy.)

Logan has a place near to it.

A. I could tell by the map, perhaps.

(Counsel hands witness map.)

A. Yes, sir.

Q. I call your attention to Section 5, Township 16 South, Range 43 East: Are you familiar with that? A. Yes, sir.

Q. I will call your attention to Section 9, Township 16 South, Range 43 East: Are you familiar with that? [484—428] A. Yes, sir.

Q. I will call your attention to Section 23, Township 16 South, Range 43 East: Are you familiar with that? A. Yes, sir.

Q. I will call your attention to Section 25, Township 16 South, Range 43 East: Are you familiar with that? A. Yes, sir.

Q. I will call your attention to Section 31, Township 16 South, Range 44 East: Are you familiar with that? A. I know where the land is.

Q. But you are not so familiar with that?

A. Yes, sir.

Q. How about Section 5, Township 17 South, Range 44 East: Are you familiar with that?

A. I have been on the land, but I am not very familiar with the land.

Q. Is that true of the other sections in Range 44 East, that you are not so familiar with those from this place on down?

A. No, sir, I am not familiar with the land.

Q. Now, in reference to those sections of land that you have answered that you are familiar with,

(Testimony of James O. Moudy.)

I will ask you what the character of growth is along the creek borders and margins—what grows on the sections?

A. There is different growths; there is parts of it has sagebrush, rye grass and greasewood, and some parts are rye grass meadow.

Q. The pieces that are rye grass meadows are pieces that have been leased out to others, is it, or isn't it?

Mr. HUNTINGTON.—Objected to as leading.
[485—429]

A. That is my understanding.

Q. What effect do you know as to salt grass—do you know the character of soil that produces salt grass? A. I do.

Q. What kind of soil is that?

A. It is considered alkali.

Q. Where you find salt grass growing on a tract of land is that land subject to an annual inundation and overflow? A. No, sir.

Q. Could the land be alkali so as to produce the salt grass if it were subject to annual inundation and overflow? A. I think not.

Q. At the season of the year when it rains and snows in the valley what effect does the rain and snow have upon the lands lying along the valley as well as those adjacent to the creek bed?

A. It has quite a good deal of effect in the way of wetting up the land.

Q. Does it saturate the soil? State whether or not it does or not.

(Testimony of James O. Moudy.)

Mr. HUNTINGTON.—Objected to as leading.

A. It does.

Q. In the valley? A. Yes, sir.

Q. Are you familiar—or does the soil need any additional saturation during the months of January, February, March or April in addition to the saturation which falls naturally upon the ground by rain and snow? A. I think not. [486—430]

Q. Are you familiar with the creeks flowing into Willow Creek below where the dam site is being constructed in the canyon above Cole's ranch?

A. I am.

Q. What creeks are there that flow into Willow Creek and the waters practically pass these lands that you speak of as being owned by the Eastern Oregon Land Company; that is, the waters that pass, if they flow on down—what creeks flow into Willow Creek from the east side?

A. There is Baker Creek, Fox Creek, Dry Creek, and there is one I think below that I can't call the name. I know it—

Q. Road Canyon Creek? Have you ever seen the waters in these creeks that you have named on the east side of Willow Creek rise? A. I have.

Q. What would be the cause of the flood coming down from those creeks?

A. It would be the rain and snow taken off by Chinook winds.

Q. The rain and snow falling in those watersheds there? A. Yes, sir.

Q. Are you familiar with the creeks flowing into

(Testimony of James O. Moudy.)

Willow Creek below the place where the dam site is and excluding Pole Creek, and on the west side of the valley? A. I am.

Q. What are the names of those creeks?

A. Black's Creek, Gum Creek, Current Creek and Little Willow Creek and Turner's Gulch.

Q. And the creek in Sheep Corral Gulch?

A. Yes, sir.

Q. Do you know whether those creeks drain a watershed that is separate from the watershed which is drained by Willow [487—431] Creek above the dam site? A. They do.

Q. Where do the waters from all these creeks go to? A. To Willow Creek.

Q. Or do those creeks come from a source above to the west and above the lands mentioned in the examination of the map a moment ago by you?

A. It does.

Q. Do those creeks carry much water with them?

A. They do at times.

Q. Have you ever seen them—or what condition of water have you seen them in?

A. I have seen them overflowing to quite an extent.

Q. To what depth would be the water when they were overflowing?

A. Well, to quite a depth at times.

Q. How deep would you call them at times?

A. Do you mean all over the ground?

Q. No, as they come down the respective creeks?

A. All the way from six to ten feet.

(Testimony of James O. Moudy.)

Q. Is a similar depth true of the creeks coming into Willow Creek on the east side which you mentioned a moment ago? A. Yes, sir.

Q. Do all these waters mingle with the waters of the various creeks or not? A. They mingle.

Q. Into what general confluence? Willow Creek?

A. They do.

Q. Do the waters of these various creeks either pass over or under the soils of the various sections of lands that you say you are familiar with of the lands of the Eastern Oregon Land Company? [488—432]

A. Over and under too, I guess.

Q. Have you ever seen more water in these various creeks at different times than would be in Willow Creek above the place where these creeks entered into Willow Creek?

MR. HUNTINGTON.—Objected to as leading.

A. I have.

Q. Have you seen Willow Creek itself in a low stage of condition when the waters of these creeks would flow into it?

MR. HUNTINGTON.—Objected to as leading.

A. I have.

Q. What effect would the water of these creeks flowing into the waters of Willow Creek have upon the water of Willow Creek?

A. It would make the water much greater in Willow Creek.

Q. Would they produce floods in Willow Creek?

A. Yes, sir.

Q. What season of the year is it when the

(Testimony of James O. Moudy.)

greatest—or, rather, what month do the freshets come down Willow Creek which overflows its banks when they are overflowed?

A. Most generally in February.

Q. At that time, and during those flood periods, whenever they occur, you may state the condition of the soil or banks of Willow Creek as to whether they are frozen or not?

A. Most generally they are frozen.

Q. This water then in a freshet, even if it overflows the banks of Willow Creek in places, what effect would it have upon the soil, bearing in mind the frozen condition of the [489—433] soil?

A. It runs off.

Q. Does it permeate the soil?

A. Not to any extent.

Q. During the months of—the winter months and spring months, and during the periods that the snows and rains fall in the valley and on land that never is overflowed, you may state whether or not that land is saturated? A. It is.

Q. You may state whether or not the condition of the soil becomes muddy or dry afterwards?

A. It becomes muddy.

Q. Have you ever seen the effect of persons riding or driving over the soil when it is in that condition? A. I have.

Q. What is the effect?

A. It becomes miry.

Q. Are you acquainted with Mr. Leonard Cole?

(Testimony of James O. Moudy.)

A. I am.

Q. How long have you known him?

A. Since 1881.

Q. Are you acquainted with Mr. Insenhorfer?

A. I am.

Q. About how long have you known him?

A. About twenty years.

Q. Are you acquainted with the location of the dam in the canyon above Cole's, the dam being constructed by the defendant company?

A. I am.

Q. Do you know its location? A. I do.

[490—434]

Q. Have you been on the dam since work has been going on? A. I have.

Q. Were you familiar with the canyon in its condition years previous to the commencement of the construction of this dam by the defendant company?

A. I am.

Q. Now, on the east side of that canyon is what is said to be Section 27, along there where the dam is being constructed. On the right side at the same place is said to be Section 28. I do not know whether you knew those are what is known as those sections—I speak of them on the east side as 27 and on the west side as 28. Now, what is the character of the ground in that canyon relative to both of those sections, as to whether it carries mineral or not?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial, and we particu-

(Testimony of James O. Moudy.)

larly object for the reason that the question as to its mineral character—as to the mineral character of the land has been once determined and adjudicated by the only tribunal who, as between these parties, has a right to adjudicate that question, and, as a result of that adjudication, a *patent* was issued by the United States Government to the lands in Section 27 and to that portion of the lands in Section 21 described in the complaint, and in evidence, as to the mineral character of the land at this time is incompetent, immaterial and irrelevant. Our objection may go to all of the evidence of this witness touching this matter?

Mr. HART.—Yes, sir, throughout the record.

[491—435]

A. It does.

Q. Above Section 27 lies, on the east side, lies Section 21, joining onto Section 27, and also Section 21 joins onto Section 28, joining on the corner with 27 and joining onto 28. Do you know the character of the ground there in Section 21 as to whether it contains mineral or not? A. It does.

Q. What kind of mineral do these various sections along the creek bottom and canyon contain?

A. Gold.

Q. Do you know whether those have ever been mined as mining claims? A. They have.

Q. Now, when were they mined to your first knowledge?

A. They were mining there in 1882 when I came to the country.

(Testimony of James O. Moudy.)

Q. And that applied to the sections, 27, 28 and 21 throughout that canyon? A. Yes, sir.

Q. Do you know whether Mr. Leonard Cole and Mr. Insenhorfer ever mined through there with others?

Mr. HUNTINGTON.—Objected to as leading.

A. I do.

Q. What years were they mining in there?

A. They were mining in there in 1896 and 1897 that I know of.

Q. Do you remember when they first went in there mining?

A. I cannot recall the date. I know when they went in there; yes, sir.

Q. About how many years ago was that?

A. Well, I could not state the number of years positively, but I [492—436] think about five years.

Q. I will ask you to refresh your memory. Do you recall them being mining in there as far back as 1895 and 1896? A. Yes, sir.

Q. Have you known of them mining in there in that vicinity off and on ever since? A. I have.

Q. Has their possession been open and notorious or secret?

A. It has been open and notorious so far as I know.

Q. Anybody could see it, couldn't they?

A. Yes, sir.

Q. I will ask you whether or not it was commonly and generally known by people in that vic-

(Testimony of James O. Moudy.)

nity and throughout Malheur County?

Mr. HUNTINGTON.—Objected to as leading, incompetent and not the best evidence.

Q. Have known the fact that Mr. Insenhorfer and Mr. Cole were mining in there through the years 1896 and 1897 clear on up to the present time—until a couple of years ago?

A. They did to the best of my knowledge.

Q. That would be up to the time the present company took possession of the property?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Do you know whereabouts they were mining in those sections in reference to the location of the dam being built by the defendant company? [493—437]

A. I do.

Q. Where were they mining?

A. They were on the west side when I saw them mining.

Q. Above or below the dam? A. Above.

Q. Have you ever seen them mining below the dam?

A. I never saw them mining below the dam.

Q. Now, what kind of mining were they carrying on? A. They were sluicing.

Q. You may state what has been the general reputation of the grounds in Sections 27, 28 and 21 as to whether or not it was mining ground, and as to whether or not it contained gold and mineral in paying quantities?

(Testimony of James O. Moudy.)

Mr. HUNTINGTON.—Objected to as incompetent in addition to the other objection.

A. It was mining ground.

Mr. HUNTINGTON.—Move to strike out the answer as not responsive to the question.

Q. How long has this property been known as mining ground?

A. I have known it as mining ground since 1882.

Q. Did it have a reputation at that time of being a—a general reputation—of being mining ground for years preceding?

Mr. HUNTINGTON.—Objected to as leading.

Q. You may state whether or not it had a reputation at that time for— [494—438]

Mr. HUNTINGTON.—Objected to as leading.

Q. Years preceding as mining ground when you came there?

Mr. HUNTINGTON.—Objected to as leading.

A. To the best of my knowledge it had.

Q. Now, not considering Sections 27 and 21 nor 28 as mining property, throwing that phase of it out of consideration, does Sections 27, 28 and 21, have they any value for agricultural or farming purposes or any other purpose excepting mining?

A. I think not.

Q. Then, if they have no value as mining property, they have no value at all?

A. Not what I would consider a value.

Q. At the most what would you say they were reasonably worth per acre?

A. I could not place a value upon them.

(Testimony of James O. Moudy.)

Q. Would 50c be a large sum per acre to put upon them?

Mr. HUNTINGTON.—Objected to as leading, witness having said he could not put a value upon them.

A. I could not consider a value on them as I consider them valueless.

Q. Then you consider that 50c would be too much?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir. [495—439]

Q. What can you say as to the land in Section 3? That is just above Cole's property, the canyon there above Cole's property. You might look at this map if you are not familiar with it. It is the property still farther in the canyon with the steep hillside above Mr. Cole's place and before you get to the dam. What would you put as its value?

A. There is portions of that land; small portions of it would be valuable.

Q. What would be the value of it along through which the creek flows in the canyon?

A. Some small bottoms there could be cultivated, but very small portions.

Q. About how much per acre at most would that be?

A. Taking the conditions as it exists at present?

Q. As it is now.

A. It would not be worth over \$1.25 an acre.

Q. Are you familiar with the land located over in Section 15, Township 15 South, Range 42 East?

(Testimony of James O. Moudy.)

A. I am.

Q. There is a piece of table-land there, or high land there that has sagebrush growing on it?

A. Yes, sir.

Q. And other portions of the hillsides going up?

A. Yes, sir.

Q. What is that worth per acre?

A. The entire section?

Q. Yes, sir?

A. With the present conditions of the land?

Q. Yes, *sur*, just as the land lies?

A. I would not consider it worth over \$1.25 an acre. [496—440]

Cross-examination by Mr. HUNTINGTON.

Q. You are related to Mr. Cole, both Mr. Leonard and Mr. Emory Cole by marriage?

A. I am.

Q. How are you so related?

A. I married a sister of theirs.

Q. You formerly owned a part of the land that is now claimed by the Willow River Land & Irrigation Company? A. I did.

Q. How much was there of it?

A. I first bought a claim of 200 acres, as swamp land.

Q. Can you describe that land?

A. I don't know as I could describe the boundary lines, but I can describe the lands.

Q. Could you tell us what section and the parts of the sections? A. It is in Section 24.

Q. All of it is in Section 24? A. Yes, sir.

(Testimony of James O. Moudy.)

Q. Does the creek go through that?

A. It does at the present time.

Q. You say you bought that as swamp land?

A. I did at the first.

Q. Did you buy it from the State or Mr. Cole?

A. I bought it from a man by the name of Richardson.

Q. Then, you mean it was considered swamp land when you bought it? A. Yes, sir.

Q. That land is a low piece of land and there is higher land between that and the creek and when the water overflows it [497—441] comes in there and stands and makes it a swampy place?

A. The water does not stand on the land.

Q. The water does not stand on the land but it soaks it so it remains swampy. In other words, there is not good drainage from it? A. No, sir.

Q. Does the creek touch this swamp part of it, or is the swamp part of it a little back from the creek?

A. May I answer that question in my own way?

Q. Why, certainly, I want you to answer all the questions in your own way.

A. The land I had there at that time there was scarcely any creek channel at all to drain the water. It flowed out there promiscuously without any channel to carry it off. I dug a drain from my place and drained this water off and dropped it into what is now called Black's Creek.

Q. That flows into Willow Creek?

A. Yes, sir.

Q. Now, when you got the drainage completed

(Testimony of James O. Moudy.)

that land was hay land, wasn't it?

A. To some extent. It was mostly willows.

Q. It could easily have been turned into hay land by removing the willows; that is, so it would have produced wild hay?

A. To a certain extent; yes, sir.

Q. Now, if that land in that condition could not have been overflowed at all, so that no water would have come onto it from the creek and it had no appropriated water by which it could be irrigated, don't you think the deprivation of that land of the overflow water would be detrimental to it?

A. I don't think it would.

Q. You think it don't need any kind of irrigation? [498—442]

A. At the time the water came it was a detriment.

Q. Suppose no overflow came on it, and water could not be put on it, don't you think it would be less valuable than if it was overflowed in the spring and the water allowed to run off again by drainage? Wouldn't you think that water was a benefit to it if it were drained off. That is, wouldn't the saturation of the soil be a benefit to it so that it would produce a crop that it otherwise would not have produced?

A. I don't think so.

Q. That is your judgment, is it?

A. Yes, sir.

Q. Now, did you buy any other land there than this 200 acres? A. I did not; that is all.

Q. That 200 acres is now under ditch, as I understand it, isn't it? A. Yes, sir.

(Testimony of James O. Moudy.)

Q. And is being irrigated?

A. There may be portions of it.

Q. Is that irrigated by water that you appropriated of the creek or is it irrigated out of the Cole ditch? A. It is irrigated out of the Cole ditch.

Q. Did you acquire any other land there? That is, did you take up any, or get title to any other land outside of this 200 acres?

A. That is all I ever owned in the valley.

Q. You came into the valley in 1882, as I understood you?

A. Yes, sir, that is when I first came into the valley.

Q. Where did you first live?

A. On Mr. Cole's place.

Q. Were you employed there? [499—443]

A. I had the ranch rented.

Q. How long did you keep it?

A. I occupied the rented part about a year or a little better.

Q. And then did you leave there or did you remain? A. I was there until 1884, the fall of 1884.

Q. Then where did you go?

A. I went to Idaho.

Q. How long were you away?

A. I came back in 1886.

Q. And where did you locate then?

A. On this place where Brogan—where the City of Brogan is.

Q. On this 200 acres you bought of Richardson?

A. Yes, sir.

(Testimony of James O. Moudy.)

Q. That is when you bought it?

A. I bought it in 1887.

Q. Do you know when the title to that 200 acres passed out of the Government—do you remember the date of the Patent?

A. I bought this land. They had the filings on the land as swamp land. I bought this man's filings. There was an examination made of the land afterwards by some Government official and they determined it not swamp land. I filed a pre-emption on the land afterwards and acquired the right to 160 acres that way.

Q. And you never did acquire the right to the other 40 acres? A. Only by possession.

Q. You never got title?

A. No, I never got title.

Q. Do you remember when you proved up?

A. I can't just recall the date.

Q. It was some time after 1886?

A. Yes, sir. [500—444]

Q. Do you know who did acquire title to that other 40 acres you had claimed? A. No, sir.

Q. Can you give us the subdivision of the section you proved up on?

Q. If I am right it is in the southeast quarter of the section.

Q. Section 24? Then it would take the whole of the southeast quarter? A. Yes, sir.

Q. What township is that?

Judge WEBSTER.—Fifteen S., R. 42 East.

Q. How long did you continue to live there, Mr.

(Testimony of James O. Moudy.)

Moudy? A. I lived there about twelve years.

Q. Then you left there about 1898—or when was it you moved away? A. I left there in 1900.

Q. And then you moved up to Cow Valley?

A. No, sir.

Q. Where did you move to?

A. I went to Huntington.

Q. How long were you in Huntington?

A. I was there until 1906.

Q. About six years? A. Yes, sir.

Q. And then you came back to Cow Valley?

A. Yes, sir.

Q. Huntington is about 20 miles from Dell?

A. Yes, sir.

Q. And Dell is the nearest point in Willow Creek Valley to the Town of Huntington?

A. By road I believe it is. [501—445]

Q. And it is about how far from Dell to Cole's place, or where Brogan now is?

A. I would judge it is about four miles.

Q. Have you ever been up to the Willow Creek Valley any great distance—or up the Willow Creek Canyon, I mean? A. I have.

Q. How far?

A. I have been to the mouth, or the head of it.

Q. About how far is that above Cole's place—the head of the creek?

A. Taking the line of the creek for measurement?

Q. Yes, sir, not exactly, but approximately. Give us your best judgment.

A. I think it would be about 36 miles up to 40.

(Testimony of James O. Moudy.)

Q. When the creek gets up into the mountains it branches out a good deal, I suppose?

A. Yes, sir.

Q. Have you ever been at the head of the principal branches which form the creek?

A. I have, yes, sir.

Q. Where are they located; that is, in a general way, in what mountains?

A. Ironside Mountain principally.

Q. That is a spur of the Blue Mountains?

A. I think so, but I am not acquainted with the ranges of the mountains.

Q. They head in the timber, or, at least, there is more or less timber up in that locality?

A. More or less; yes, sir.

Q. And the creek, of course, increases in volume as you come down from those heads until you get down out of the canyon? [502—446]

A. Yes, sir.

Q. Where does the principal volume of water which forms Willow Creek come from?

A. I think it comes from Ironside Mountain.

Q. Through the main channel of the creek?

A. Yes, sir.

Q. Have you ever made any accurate measurements of the precipitation of the moisture in the valley? A. I have not.

Q. Then your statement in that respect is simply, as I understand it, your observation during your residence here? A. It was.

Q. You never have lived upon or farmed any land

(Testimony of James O. Moudy.)

below Cole's or below where Brogan is in the valley?

A. No, sir.

Q. Apart from the years 1909 and 1908, how many years have there been since you have been familiar with the conditions in Willow Creek Valley that the flood waters have not extended out over the banks of Willow Creek and flooded more or less the flat land along the creek—going back to that period?

A. I cannot state the number of years; there has been several years, though, that have been very much like the years you have mentioned.

Q. Isn't it true that, with the exception of about one year prior to 1908 that the waters of the creek have flooded the flat lands to a greater or less extent every year?

A. They have not flooded every year; no, sir.

Q. You think not? A. No, sir.

Q. Well, could you tell us about how many years they have not been flooded? [503—447]

A. Back when I first came?

Q. Yes, sir.

A. I couldn't give the exact number of years, but I would suppose about four or five years, though, in that length of time.

Q. And, as I understand you, the flooding in some years is much more extensive than other years?

A. Yes, sir.

Q. A person impounding the waters of Willow Creek, if they are going to acquire water enough to irrigate the valley or any considerable part of the lands in the valley would have to store water so as

(Testimony of James O. Moudy.)

to meet the contingency of no flood water at all, would they, assuming now they are taking only flood water and not the water in the creek?

Mr. HART.—Objected to as immaterial and not proper cross-examination.

A. I do not consider the flood water itself any good in the way of irrigation, and to save the flood waters they could irrigate the land that could be made to produce.

Q. Yes, sir, I understand that, and that does not quite answer my question. But, if a person was undertaking to store that flood water, they would have to have a storage capacity large enough so that some years they would have to carry over, or have to have water in the reservoir, to supply a whole year's irrigation without any replenishing of the reservoir if they were storing only flood waters?

Mr. HART.—Objected to as immaterial because it assumes the term "flood water" means only the overflow or [504—448] water enough to overflow.

A. I don't quite understand the question exactly.

Q. Let me put it in a little different way. You say that in some years there is no flood water?

A. Yes, sir.

Q. Then, if one is going to hold water for irrigating purposes and store it, it would be necessary to store enough in some years to carry over and furnish irrigating water some years without having any supply at all, wouldn't it?

A. I think it would be better.

Q. It would be almost necessary, wouldn't it?

(Testimony of James O. Moudy.)

A. I think so.

Q. Now, what do you mean by "flood waters"?

A. It is waters that is too great for the channel to carry off and it spreads out over the land.

Q. Did I understand you to say there was practically no flood water in 1909?

A. There was a little flood water in 1909, early in the spring or breaking up of winter.

Q. That was observed only in the upper valley?

A. I noticed it quite a ways down the valley.

Q. How far?

A. Down as far as Mr. Boggs' place and below.

Q. Did it extend out from the banks on the Scott place and along there?

A. There was water *dame* down those gulches and ran over the banks there.

Q. Yes, sir, but I am talking now about the main channel of Willow Creek.

A. I never noticed the water out of the banks there from the creek. [505—449]

Q. I want to ask you about the Richardson place: That is the one you referred to as being acquired by yourself?

A. Yes, sir.

Q. That is right at the Cole place, isn't it, adjoining the Cole place?

A. It adjoins one part of his ranch they used to call the swamp ranch.

Q. The Kelly place, how much of that was swamp so that it was injured by the overflow?

A. Kelly's own property?

Q. The place you referred to as the Kelly land?

(Testimony of James O. Moudy.)

A. He has some ground on the creek bottom there that overflows. I don't know just exactly how much it would be.

Q. As I understand you, he had made some effort to get the overflow water off his land. Now, how much of that land did he have to drain?

A. Just making a guess I would guess between ten and fifteen acres.

Q. He drains that by taking a ditch back to the creek? A. Yes, sir.

Q. And with that land drained in that way, although it overflows every year the water gets out of the banks, he raises crops on it, doesn't he?

A. He does to some extent.

Q. The grasses which grow on that kind of land are wild grasses and blue joint and red top and rye grass?

A. Rye grass don't usually grow where there is flooded land as much. This wild grass is all right.

Q. The other wild grasses that I have mentioned?

A. Yes, sir.

Q. The road up and down Willow Creek and the road you usually [506—450] travel in going from the so-called Richardson place that you acquired title to and Vale passes a large part of the way along the bench land, doesn't it?

A. There is a part of the way that is on bench land; yes, sir.

Q. And from that road you could see the portions of the valley? A. Yes, sir.

Q. Now, counsel asked you as to whether or not,

(Testimony of James O. Moudy.)

or asked you if the rain and snow did not make the ground muddy. It does not take very much rainfall to make the surface of the ground muddy in this soil, does not? A. It has got to be saturated.

Q. It has to be saturated, what do you mean by that? A. It has got to be wet clear down.

Q. It has to be wet clear to the gravel?

A. It is a long ways to gravel. It would have to meet the moisture that raises from the bottom.

Q. Don't you know, Mr. Moudy, that, as a matter of fact, that after a heavy rain the surface of the ground would be muddy when, if you should plow six or eight inches deep that you would find the ground entirely dry?

A. It would be muddy to a certain extent until that water—

Q. Finally settled down?

A. —finally settled down; yes, sir.

Q. Immediately after the precipitation the surface of the ground would be muddy and soft, and yet you might go down a foot and find it quite dry?

A. It can be so; yes, sir.

Q. Now, referring to the creeks that flow into Willow Creek below the Cole place, or below Brogan, these creeks all rise on the hills along the sides of the valley, do they not? A. They do. [507—451]

Q. Those hills have upon them some sagebrush?

A. Sagebrush and bunch grass.

Q. And greasewood?

A. And greasewood.

Q. Some of these creeks are quite short; that is,

(Testimony of James O. Moudy.)

the entire channel would not usually be more than from three to eight miles?

A. I do not know any that I have mentioned that would not measure over eight miles.

Q. How long would they be, do you think?

A. I think they would make an average of from twelve to fifteen miles.

Q. Do you know what is the elevation of these hills along the sides of the valley *are*?

A. I do not.

Q. The hills on the—going up the creek, the hills on the southeasterly side; that is, on the left-hand side going up the valley there is a ridge between Willow Creek and Pole Creek, isn't there?

A. There is.

Q. And they come to a—the hills come to a pretty sharp ridge there on top and slope downhill immediately into Pole Creek; that is, there is not much table land? A. There is some table land.

Q. That is when you get down towards Vale?

A. Yes, sir.

Q. The hills farther up are quite sharp?

A. No, sir, there is quite a little table land up in Cotton Wood and heads off that way.

Q. The most of it slopes in toward Pole Creek?

A. Yes, sir. [508—452]

Q. When you get to the top of the hill going up from Willow Creek you at once get onto the watershed that goes to Pole Creek? A. Yes, sir.

Q. Which creeks come in from the southeasterly side that you have mentioned?

A. There would be Black's Creek, Gum Creek—

(Testimony of James O. Moudy.)

Q. Current Creek?

A. Current Creek, Sheep Corral, Little Willow Creek—

Q. And Turner Gulch?

A. Turner Gulch; yes, sir.

Q. How long is Turner Gulch?

A. I would term it twelve miles or better to the best of my knowledge.

Q. These streams most of them run dry after the snow has gone off, don't they?

A. Not entirely.

Q. Which ones run the entire year, so as to discharge water into Willow Creek?

A. I don't know any of them that runs clear to Willow Creek the entire season.

Q. Now, Baker Creek, Fox Creek, Dry Creek and one other come in on the northerly side?

A. Northeast side; yes, sir.

Q. How about those creeks? Don't most of them cease flowing before they reach Willow Creek during the part of the year after the snows have gone?

A. They do.

Q. And none of those flow at all after the spring snows have gone?

A. They flow in portions of the creek; they rise and sink. [509—453]

Q. But the entire discharge of these creeks is inconsiderable as compared with the entire discharge of the main creek that comes out of the canyon above the Cole place, taking it the year around, isn't that the fact?

(Testimony of James O. Moudy.)

A. I would suppose the discharge from those creeks would be fully as much as the discharge from the creek above Cole's.

Q. Taking it the year around?

A. Well, no, I am not thinking of the year around. But in the flood season it would.

Q. Taking it the year around the total discharge of these creeks along these lower hills is very small as compared with the total discharge during the year of the main creek?

A. That is including all the waters that come down in all during the season?

Q. Yes, sir.

A. I would not consider there was very much difference.

Q. Do you mean to say there is as much water comes off these hills on each side of the valley during the year as comes down through the main channel of Willow Creek?

Mr. HART.—Objected to as immaterial because they form part of the main channel.

Q. I mean that comes out of the main channel above Cole's?

A. I will say there is times when they furnish more water than the channel above Cole's does; much more water.

Q. There would be times like this: When it was colder up in the mountains and the watershed which furnishes the creek above the canyon—just above Cole's place—

A. Yes, sir.

Q. —and very little water apparently would be

(Testimony of James O. Moudy.)

coming down the [510—454] main channel and at the same time it would be very much warmer on these hills down here and in the valley, so that for a few days there might be a larger flow coming from these small creeks you have named than would be coming down at that time through the main channel of the creek. That is all that you mean, isn't it?

A. It comes down at different times. It don't always come at the same time from those creeks. The creeks I have mentioned below Mr. Cole's place, the water at times runs off and has gone before the other creek goes up from the upper channel—from the upper country.

Q. And that is what you meant by your former answer?

A. I don't remember what I answered now.

Q. Well, you said that at times there was more water flowing down in the valley from these small creeks than came down from the main channel.

A. Yes, sir.

Q. That is what you meant, because of the warmth down here that sets the water flowing in these small creeks and it is colder up in the mountains and does not set the water flowing in the main channel?

A. From the observation I have had I think as much water comes from those small creeks during the season as from the main channel from Ironside.

Q. Taking it the year around? A. Yes, sir.

Q. You think as large a quantity of water flowing through these small creeks as there is flowing

(Testimony of James O. Moudy.)

through the main channel above Cole's place all the year around? A. No, I didn't say that.

Q. Taking the amount of water that comes down the entire year? [511—455]

A. That is different; I think so.

Q. When did you first see Leonard Cole or Insenhorfer mining up there in the canyon?

A. I can't state just the exact date.

Q. Can you give us the year? A. No, sir.

Q. Can you give us approximately the year?

A. I seen them there in 1905.

Q. You saw them there in 1905?

A. Yes, sir.

Q. What were they doing there?

A. I conveyed them from their mining camps to town.

Q. How long were you up there?

A. I was there at different times, only a short time. I would take them from Huntington back to their mines and so on.

Q. When did you first take them up there then?

A. I can't give you just the exact date. I could if I had my books here. I was running the livery business and done their work for them.

Q. Was that in 1905?

A. To the best of my knowledge it was 1905.

Q. Then you went up after them that same year again?

A. I was there with them and took them to and from their mines several times during the year.

Q. How long were they there at each time?

(Testimony of James O. Moudy.)

A. Mr. Insenhorfer stayed there most all the time.

Q. He stayed there most all of the time?

A. Yes, sir.

Q. But you took Mr. Cole back and forth?

A. Yes, sir.

Q. How long did Mr. Cole stay there approximately? [512—456]

A. I could not say exactly.

Q. Approximately?

A. Two or three months.

Q. Was he occupying the cabin there, the old cabin? A. Yes, sir.

Q. When was he there when you were there in the canyon so you knew of your own knowledge, where was he working?

A. Nearly across from the cabin but just a little below.

Q. Across from the cabin and a little below?

A. Yes, sir.

Q. Did you know of his mining anywhere else of your own knowledge?

A. I did not see him working anywhere else; I saw where the work had been done.

Q. You did not see him do the work but you saw where the work had been done? A. Yes, sir.

Q. When did you next know of their being there of your own knowledge? A. In 1907.

Q. Did you take them over then?

A. No, sir.

Q. How did you come to be there?

A. I was hunting stock.

(Testimony of James O. Moudy.)

Q. Where were they working at that time?

A. They were working still below where they was at the time I first saw them.

Q. A little lower down? A. Yes, sir.

Q. How much below?

A. Well, I could not say just how far. [513—
457]

Q. Were they working—were they using the ditch? A. Yes, sir.

Q. And turning the water from the ditch down out there to where they were working?

A. Yes, sir.

Q. How did they bring it down the side of the hill? A. By a pipe.

Q. Was there any supply of water there at all so the water ran down the side of the hill at any time?

A. They conveyed the water from the ditch in a pipe to their mining.

Q. Wasn't there times when they were not using it there was a spillway there?

A. There might have been; I did not notice.

Q. Now, they were not doing any mining below the end of the ditch so far as you saw?

A. No, sir.

Q. How far up the canyon did you go above the cabin? A. Above the cabin?

Q. Yes, sir.

A. Oh, I should judge about four miles.

Q. Did you see them doing any work as far up as a mile above the cabin, or half a mile? That is, did

(Testimony of James O. Moudy.)

you see them doing any work there themselves?

A. I saw them working on the ditch.

Q. You saw them working on the ditch but I mean in the canyon? A. I did not.

Q. How long were you there at that time?

A. Just a very short time.

Q. A day or so? [514—458] A. No, sir.

Q. A part of a day?

A. Just probably an hour or an hour and a half, I can't say; I just dropped in there and stopped awhile.

Q. When were you next in the canyon?

A. I was in the canyon last fall.

Q. That was after the commencement of the construction of the dam? A. Yes, sir.

Q. Now, with the exception of 1905 and 1906 all you know about their mining in there was what you had heard?

A. I saw where the work had actually been done.

Q. You saw that somebody had done some work there? A. Yes, sir.

Q. All you know about what they themselves had done was what you had heard? A. Yes, sir.

Q. But it was 1905 and 1907 that you were there?

A. Yes, sir.

Q. Who was there in 1907?

A. Mr. Insenhorfer.

Q. Mr. Insenhorfer was there in 1907?

A. Yes, sir.

Q. What was he doing when you were there in 1907?

(Testimony of James O. Moudy.)

A. At the time I was there he was working close to the bed of the creek.

Q. Throwing gravel into a sluice or simply digging it out? A. He had a sluice there; yes, sir.

Q. The travelled road which crosses the canyon crosses the creek about two miles above the canyon, doesn't it?

A. I don't know what the distance is, but it is quite a ways [515—459] above the cabin.

Q. Not far from two miles?

A. I suppose so.

Q. That canyon is more or less crooked and has bends in it? A. Yes, sir.

Q. You cannot see the cabin from the road, can you, from where the road crosses the creek?

A. I think not.

Q. You have said there was no value for these lands in Sections 27 and 21. Do you not think they are of some value for reservoir purposes?

Mr. HART.—Objected to as incompetent, you claim the injury to your land is to have the reservoir and irrelevant.

A. They could be of value in that way; yes, sir.

Q. Suppose you owned a large body of land in the valley below and also owned that land up in the canyon, do you think you would be willing to sell that land at 50¢ an acre if it included all the rights along the creek?

Mr. HART.—Objected to as incompetent, irrelevant and immaterial.

(Testimony of James O. Moudy.)

A. My understanding of the question asked me awhile ago was if the lands were valuable as they exist. I said, "No."

Q. Aren't they of value for any purpose to which they can be put now excluding the mining?

A. They could be put to value for a reservoir.

Q. And would be of large value for a reservoir?
[516—460] A. Yes, sir.

Q. Have you ever surveyed or seen surveyed the section lines between Sections 27 and 28 and between Sections 21 and 28? A. I have not.

Q. Then you do not know how much, if any, of this so-called placer mining ground is on Section 27, if any, and you do not know how much of it is on Section 21, if any?

A. No, sir, not in regard to sections.

Redirect Examination by Mr. HART.

Q. But the placer ground is on each side of the creek that flows down there?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. You spoke of seeing them work a little above the dam: Did you see where mining work had been done below the dam? A. I did.

Q. Now, if a person owned, you said, the dam site—the Sections 27 and 28 in there might be valuable for the person to put in a dam site if the person owned a large quantity of land down below, but if the person owning land down below did not have any right to the water, if the water all belonged to

(Testimony of James O. Moudy.)

other [517—461] people, then is the land of any value as a dam site to him?

A. If he had no water to place in it?

Q. And if this Eastern Oregon Land Company owned no right by appropriation or otherwise for any water then, even if they did own that it would be of no value to them, would it?

A. Not unless they could slough it off on some company for a dam site.

Q. But if there was just equally as good a dam site up say in Section 24 on up the creek, or any of the other places up the creek, why there would be no difference in the location except one happened to be occupied, that is all the difference?

A. That is all that I can see.

Q. Now, counsel asked you what you understood by flood water, and your answer to him was the quantity of water coming down in the spring or freshet season of the year which would be in excess of the amount of water that the creek was able to carry within its natural banks. I understood you to say that?

A. Yes, sir.

Q. And you stated the natural banks of the creek from up in Section 31 clear on down into Township 17 South, Range 44 East, the lower portions of the banks you stated was three to four feet high?

A. Yes, sir.

Q. And then the creek could carry the spring's rains or floods to the depth of three or four feet before it would flood any land?

Mr. HUNTINGTON.—Objected to as leading and

(Testimony of James O. Moudy.)

not proper redirect examination—very leading.
[518—462]

A. Yes, sir.

Q. And the width of the creek as it passes down through section 31 and through other sections is about how wide?

A. It varies very much in width. It would be all the way from ten to one hundred feet in places.

Q. All the way from ten to one hundred feet wide in places? A. Yes, sir.

Q. And even in Section 31 it is of a wider width than that, isn't it? A. Yes, sir, I think so.

Q. And where you speak of it being ten feet do you have reference to the main channel of the creek or where it divides off into numerous channels?

A. The main channel of the creek.

Q. And at that place also be numerous little channels? A. In a great many places.

Q. Now, this spring water or freshet water that would come down to a depth say of three to four feet, but not sufficient to overflow any land that could be saved in the reservoir, couldn't it?

Mr. HUNTINGTON.—Objected to as leading.

Q. Well, could it or could it not be saved in a reservoir located on this dam site?

Mr. HUNTINGTON.—Same objection—leading.

A. All the waters that come down above could but that below it could not.

Q. I said that above. [519—463]

A. Yes, sir.

Q. And the saving of that water would be an

(Testimony of James O. Moudy.)

injury to no one living down the valley, would it?

Mr. HUNTINGTON.—Objected to as leading.

A. I think not.

Q. Do you know the condition of the creek as it exists through the Eastern Oregon Land Company's land up and down the valley as it exists at the present time? A. Not all of it.

Q. Generally, I mean? A. Yes, sir.

Q. During the months of June, July and August and September of the various years, are you familiar with it then? A. Yes, sir.

Q. Is there any difference in the conditions there those months in the creek in any of the years, whether the creek had a flood or did not have a flood?

Mr. HUNTINGTON.—Objected to as having been fully gone into and as leading.

A. I think the flood makes no difference in regard to the water then.

Q. Through those months after the flood waters run off it makes no difference?

A. I think not.

Q. This land of yours which you bought in there from Mr. Richardson (was that the party?), did you afterwards sell them, and, if so, to whom? [520—464] A. To Mr. Emory Cole.

Q. Counsel asked you about some low land on this portion of the land of yours I will ask you whether or not that land of yours the low land he spoke of would be saturated annually by the rain and snow that would naturally fall upon it?

Mr. HUNTINGTON.—Objected to as leading.

(Testimony of James O. Moudy.)

A. It would.

Recross-examination by Mr. HUNTINGTON.

Q. How far below the dam site was mining work done?

A. I don't know what the distance was just exactly. In fact there has been mining more or less done quite a distance there to a small extent.

Q. Now, Mr. Moudy, you stated on your first cross-examination that they did no work below the end of the ditch?

Mr. HART.—Objected to because counsel is mistaken. He said he did not see them doing any work down there.

A. The ditch extended much farther down than where they were doing the work and the ditch at that time extended down to as far as where the dam is now.

Q. But no farther? [521—465]

A. I won't say how much farther.

Q. Isn't it true that it stopped there?

A. I won't say whether it did or not; I don't know.

Q. How much work—what work did you see done? Just describe it.

A. It looked like rocker work.

Q. Where was it? A. In the section—

Q. How far?

A. You will find places all along the creek for a mile or so below the dam.

Q. How far was the first one below the dam?

A. It is not very far; I don't know just what the

(Testimony of James O. Moudy.)

distance would be.

Q. Well, can't you give us any estimate of the distance?

A. I do not think to exceed 200 yards.

Q. What work was done there?

A. It looked like it had been done by rocker work.

Q. How many cubic yards of earth or gravel had been taken out there?

A. That is a question I could not hardly answer; I don't know.

Q. Enough so that anybody passing up and down the canyon there could readily see it?

A. Yes, sir.

Q. And a person going through with a view of ascertaining what work had been done there would have to see it? A. They could if they wanted to.

Q. They could if they examined it to see?

A. Yes, sir.

Q. How far below that was the next one?

A. Now, in regard to distances I could not tell you. It is [522—466] probably half or three-quarters of a mile.

Q. How much of a place was dug out there?

A. Well, now, I could not say; there is quite a hole there.

Q. How far were these holes from the edge of the creek? A. From where the channel was?

Q. Yes, sir.

A. Not very far; just a short distance.

Q. A few yards or a few feet?

(Testimony of James O. Moudy.)

A. Oh, it is probably a few yards, I would say.

Q. When did you first see these places you have spoken of?

A. In 1905 I prospected the canyon from Mr. Cole's place plumb above the mine. That is how I come in contact with those places.

Q. And the men who had gone before you had prospected it in the same way? A. Possibly.

Q. Those places you speak of were prospects and that was all?

A. There had been some mining done there; I don't know just how much.

Re-redirect Examination by Mr. HART.

Q. Did you ever see any gold taken from those mines?

Mr. HUNTINGTON.—If you saw the gold taken out. But if these questions calls for an answer that he had seen gold reputed to have been taken out we object to it as incompetent, [523—467] irrelevant and immaterial.

Q. You may answer the question in such manner as you wish.

A. All the gold I actually saw taken out from the mine was the gold I panned out myself in a gold pan.

Q. Did you see any other gold in the possession of anyone as coming from the mine or said to have come from the mine?

Mr. HUNTINGTON.—Objected to as not the best evidence, hearsay and incompetent, irrelevant and immaterial.

A. I have.

(Testimony of James O. Moudy.)

Q. About what quantity was that?

Mr. HUNTINGTON.—Objected to as not the best evidence, hearsay, incompetent, irrelevant and immaterial.

A. As to that I could not say.

Q. In dollars and cents?

A. As to that I could not say.

Q. About how much did you see?

A. What I saw was in a buckskin sack, between three and four inches long.

Mr. HUNTINGTON.—Objected to as not the best evidence, hearsay, incompetent, irrelevant and immaterial. Let the same objection go to all of this.

Q. About how wide or thick was the sack?

A. Just an ordinary buckskin sack.

Q. Who had it? [524—468]

A. Leonard Cole.

Q. When did he show it to you?

A. Sometime in 1905, I think, if I remember right.

Q. Was that on one of the trips when you were taking him from the mine?

Mr. HUNTINGTON.—Objected to as leading.

Q. State whether or not it was on one of those trips.

A. Yes, sir, it was on one of those trips.

Q. About the time you got to town or when nearing the town?

A. About the time we got to town.

Q. Had he gotten out of the vehicle or out of your seat from the time he started from the mine

(Testimony of James O. Moudy.)

until he showed you this gold?

A. I do not recall him getting out.

Q. Did he make any statement to you at that time where it came from?

Mr. HUNTINGTON.—Objected to as hearsay, not the best evidence and incompetent.

A. He said it came from the mine.

Re-recross-examination by Mr. HUNTINGTON.

Q. When did you take out gold from the creek?

[525—469] A. I *taken* out gold in 1905.

Q. Whereabouts?

A. Right close to where the mining has been done.

Q. That is above the dam site?

A. Above the dam site; yes, sir.

Q. How many pans did you pan out, if you remember?

A. I can't state how many pans. Quite a few.

Q. How long were you prospecting there?

A. There was three of us in company. We prospected from Mr. Cole's place to Mormon Basin. I think we were in the canyon probably four days.

Q. Now, how much gold did you take out anywhere in the canyon from the place where the dam is located up, we will say, up the first quarter of a mile?

A. Above the dam?

Q. Yes, sir.

A. How much gold did we take out?

Q. Yes, sir.

A. I can't state. We were only prospecting and would only get a prospect and maybe two and a half cents up to five cents a pan.

(Testimony of James O. Moudy.)

Q. And that was true all the way up, up to a mile and half it was all the same?

A. I could not say. We found many points that paid better. We got better prospects on some than on others.

Q. Sometimes you did not find any?

A. I do not remember the pan we did not get some colors in.

Q. What is the nature of the gold there?

A. It is very red.

Q. I am talking about the fineness or coarseness of it? A. It is what I consider fine gold.

[526—470]

Q. This buckskin sack you saw was about how long?

A. I don't know how long a sack it was, but the gold in the sack looked to be about three and a half to four inches.

Q. And the sack, *and the sack*, before it was filled, was about an inch or an inch and a half across it?

A. I would suppose that, just as a guess.

Q. Did Mr. Cole tell you anything about how long they had been getting that much gold in the canyon?

A. He did not.

Q. Do you remember whether it was in the latter part of the season or the early part of the season that you were taking him out?

A. It was about the middle part of the season, I think.

Q. Was he closing up his work there then or was he just going out temporarily?

(Testimony of James O. Moudy.)

A. I could not say as to whether he was closing up or not.

Re-re-redirect Examination by Mr. HART.

Q. Did he ever tell you he had taken out gold at other times?

Mr. HUNTINGTON.—Objected to as immaterial in addition to the other objection.

A. He did.

Q. At the time he was carrying on mining operations? [527—471]

Mr. HUNTINGTON.—Objected to as not the best evidence, hearsay, incompetent, irrelevant and immaterial.

A. He did.

Q. Do you know how many pans of earth it would take to make a cubic yard? A. No, sir.

Q. Have you any idea, how many? Would it run up into the hundreds, or how much?

A. It would take a great many pans; a cubic yard of dirt would be quite a number of pans I would think.

Q. Can you give an estimate, I understand you do not know accurately?

A. I would hate to give an estimate of that because I never measured the ground I panned out.

Witness excused. [528—472]

[Testimony of A. A. Derrick, for Defendant.]

A. A. DERRICK, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Where do you live?

A. On Willow Creek.

Q. What age man are you? A. I am 42.

Q. How long have you lived in Willow Creek?

A. Since 1886.

Q. Whereabouts on Willow Creek do you live?

A. I live about a mile below Dell.

Q. You live about a mile below Dell?

A. Yes, sir.

Q. Your property is in the vicinity of what property?

A. It is in Section 10, Township 16 South, Range—

Q. Does Willow Creek flow through your land?

A. A portion of it.

Q. It flows through a portion of your land?

A. Yes, sir.

Q. Are you familiar with the land owned by the Eastern Oregon Land Company up and down the valley and in the vicinity of where you live?

A. Yes, sir, most of it.

Q. And you have lived there at that place for how many years?

A. Six years at the place where I am living.

Q. What other place did you live on?

(Testimony of A. A. Derrick.)

A. I lived on one of Mr. Cole's places for three years. [529—473]

Q. What other?

A. And on upper Willow Creek for several years.

Q. That is up beyond where the dam site is now?

A. Yes, sir.

Q. Do you know the character of the ground in Section 31, Township 15 South, Range 43—I will point it out here to you on the map?

A. Yds, sir.

Q. Are you familiar also with Section 5, Township 16 South, Range 43 East, through which the creek flows? A. Yes, sir.

Q. And with Section 9 just below that through which the creek flows? A. Yes, sir.

Q. And with Section 23? A. Yes, sir.

Q. Also below that through which the creek flows? A. Yes, sir.

Q. And with the other sections through which the creek flows are you familiar with them?

A. Yes, sir.

Q. Now, are you familiar with—also with the rainfall and the snowfall in the valley during the—what is termed the rainy season of the year?

A. Yes, sir.

Q. That rainy season of the year extends from when to when?

A. Well, from the first of November to the first of May generally.

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(Testimony of A. A. Derrick.)

Q. How does the rain fall as a general thing through the valley? That is, does it come in torrents or does it dribble along with lighter rains through days and nights? [530—474]

A. Well, it comes in all kinds of shapes.

Q. It rains in all kinds of ways?

A. Yes, sir.

Q. Then you get all these various varieties either from heavy or from light rains? A. Yes, sir.

Q. When you have the light rains as they occur there do they fall for days at a time in rain?

A. At times they do.

Q. Through the rainy season? A. Yes, sir.

Q. Have a spell of several days of rain or snow—falling water? A. Yes, sir.

Q. What effect would that have on the ground?

A. It makes it wet.

Q. Does it saturate the soil? A. Yes, sir.

Q. Now, have you had occasion during your residence in the valley to observe what is called the spring freshets or flood waters? A. Yes, sir.

Q. Have you had occasion to observe in a general way the times when the flood waters would become so great that they would overflow the banks of the creek? A. Yes, sir.

Q. From Cole's place on down through the valley into Townships 17 and Range 44, down in through there clear up the banks of the stream from Cole's place clear down about what would be the height of the lower portions of the bank at the lowest places?

A. Well, they vary. [531—475]

(Testimony of A. A. Derrick.)

Q. Three or four feet in height?

A. Some places there is not hardly any creek channel at all, and other places there is deep creek channels.

Q. The banks at the deep places would be about how high? A. The creek channel?

Q. No, the banks of the earth.

A. Oh, all the way from ten to twenty feet high.

Q. You say at other places the main channel of the creek is very low? A. Yes, sir.

Q. At some places they have numerous smaller channels instead of large channels?

A. Yes, sir.

Q. But the depth of those numerous smaller channels where they are, about how large are they?

A. Oh, all the way from three to five feet deep.

Q. Then could, or could not, quantities of water come down three to five feet in depth before it would overflow those banks? A. Yes, sir.

Q. Your term of "flood water" then is particularly true then with reference to what?

A. To the melting of the snow.

Q. But in regard to the quantity of water?

A. Well, I would term it was so much the creek banks would not hold it.

Q. The term "flood water" then means the amount of water in excess of what the banks of the creek or channels of the creek can hold?

A. That is what I would term it.

Q. It is a quantity of water sufficient to overflow the banks of the creek coming down annually?

(Testimony of A. A. Derrick.)

A. No, sir. [532—476]

Q. Does it come down practically annually, or is it just occasionally or spasmodically?

A. It is just occasional.

Q. Can it be counted on by the farmers in the valley by which they can calculate on for the production of crops?

Mr. HUNTINGTON.—Objected to as leading.

A. No, sir.

Q. About how much of the land is overflowed in Section 5, Township 16 South, Range 43 East?

A. You mean annually?

Q. Yes, sir—no, not annually, but even when they do have an overflow I understand there is no such thing as an annual overflow, but when they do have an overflow occasionally or otherwise, about how much of the land is overflowed?

A. Well, I would think about ten or fifteen acres.

Q. About how far away from that place do you live?

A. About a mile and a half.

Q. Now, in Section 31, Township 15 South, Range 43 East: Is any of that land ever overflowed?

A. No, sir, I think not; not from Willow Creek.

Q. Now, in Section 9, Township 16 South, Range 43 East: Is there any overflowed land on that?

A. There is a very little.

Q. Amounting to about how much?

A. Well, now—from Willow Creek?

Q. From Willow Creek; that is, overflowed even in the years when it is overflowed.

A. I would think three or four acres.

(Testimony of A. A. Derrick.)

Q. And what section is it you live in? [533—
477] A. Section Ten.

Q. What Section, Township and Range?

A. Section 10, Township 16 South, Range 43 East.

Q. I will call your attention to Section 23, Township 16 South, Range 43 East: Is there any overflowed land on that? A. Why there is at times.

Q. About how much would that be, even at the high times?

A. I would guess it at probably ten or twelve acres.

Q. You use the word "guess," you mean that is the result of your observation and judgment as to the amount? A. Yes, sir.

Q. Now, I call your attention to Section 25, Township 16 South, Range 43 East: Is there any portion of it that is overflowed? A. There is at times.

Q. About how much would that be?

A. I would think probably fifteen acres.

Q. You have reference to the amount that is overflowed in Section 25 excluding Mr. Scott's property?

A. Yes, sir.

Q. Well, do any of these water—any of these lands receive waters from creeks other than Willow Creek? A. Yes, sir.

Q. What other creeks flow in or on or under these lands? A. Gum Creek flows onto Section 9.

Q. Does the water of Gum Creek flow onto Section 9 before it reaches Willow Creek?

A. Yes, sir.

Q. Does Gum Creek run throughout the year?

(Testimony of A. A. Derrick.)

A. No, sir.

Q. Do you know whether or not it has an underflow that goes throughout the year? [534—478]

Mr. HUNTINGTON.—Objected to as leading.

A. It rises and sinks; there is portions of it that has water all the year.

Q. If you saw water in some portions of it all the year what would you say as to whether it flowed underground also all the year?

A. I would say that it did; yes, sir.

Q. Now, do you know the value of property located along the creek, unimproved, such as I have called your attention to in Sections 5, 9, 23 and 25, and those other places—the overflowed lands that you have mentioned?

A. I know what I would think would be their value.

Q. What kind of vegetation grows upon that land?

A. Well, it has generally—which, of this overflowed land?

Q. Well, on the land up and down the creek that is not overflowed at all. A. Sagebrush.

Q. Sagebrush and greasewood?

A. Some greasewood in places.

Q. Will sagebrush and greasewood live on land that is annually or practically annually overflowed?

A. No, sir.

Q. Is there sagebrush and greasewood growing on all of these specific pieces of land I have called your attention to with the exception of the land you

(Testimony of A. A. Derrick.)

have said is overflowed?

A. There is Section 5—there is several acres of meadow-land on that that the sagebrush has been grubbed off of.

Q. That is not a part of the overflowed land?

A. It is not a part; no.

Q. Well, this that has not been worked and is unimproved in [535—479] which you speak of an amount of land as being overflowed; now, with the exception of that, does the rest contain a growth of sagebrush and greasewood, and also excepting this grubbed land you have talked about?

A. Yes, sir.

Q. Will salt grass grow upon land that is annually inundated and overflowed? A. No, sir.

Q. Salt grass grows in what kind of soil?

A. In alkali.

Q. In alkali, and you would say, or would you say when you saw salt grass growing on a tract of land that that is proof whether or not it is overflowed annually?

Mr. HUNTINGTON.—Objected to as leading.

Q. Could you say it is or is not proof of that?

A. It is proof that the water does not stay on it very long at a time.

Q. It is proof that the water does not stay on it very long at a time: You mean by that that it is not subject to annual overflow and inundation?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. What is the value of the bench land that con-

(Testimony of A. A. Derrick.)

tains the growth of sagebrush and greasewood up the valley in these various sections?

A. Well, there is a good many places that has not very much value. [536—480]

Q. Speaking of that character of land with sagebrush and greasewood growing upon it, what would you say would be its value, be it little or great?

A. I think \$1.25 an acre.

Q. These various tracts of land you have spoken of as being overflowed in the sections mentioned, and in any other of the sections which the Eastern Oregon Land Company has, what is the value per acre of such land as that?

A. Just as it is in its present condition?

Q. Yes, sir.

A. Why, I don't think it is valued at over \$1.25 an acre.

Q. The overflowed land?

A. Oh, the overflowed land?

Q. Yes, sir, the overflowed land.

A. Well, it might be worth \$10.00 an acre.

Q. The land that is overflowed that you have mentioned, is it lower or higher than the other lands that you speak of as being worth \$1.25 an acre?

A. It is lower.

Q. Does it receive water from any other source, these overflowed tracts, in addition or outside of Willow Creek?

A. Some of it does.

Q. Does it receive moisture from any source in addition to and not considering the overflowed waters whenever they do occur?

(Testimony of A. A. Derrick.)

A. Why, it rains and snows on it the same as others.

Q. It rains and snows on it the same as others. What effect does the rain and snow falling upon it have upon this land?

A. It makes it wet and muddy.

Q. Saturates the soil?

A. Yes, sir. [537—481]

Q. Have you ever seen the water in the creek so high that it would overflow the land or any of the lands in the valley? A. Yes, sir.

Q. The season of the year when that comes, whenever it does come, is what?

A. It is in the early spring, the first of March or last of February generally; it varies in time.

Q. Previous to that time, through the winter, has there been rain and snow also upon the land?

A. It generally freezes up about the first of December and we generally have cold weather until along in February, freezing weather.

Q. At the time this flood of overflow water does occur, whenever it occurs, is the ground frozen or thawed out? A. It is generally frozen.

Q. What effect then does the overflow water have on the soil as to whether it sinks in or runs off the soil because of its frozen character?

A. It will run off.

Q. Now, what can you say as to whether or not the overflow water is a benefit to the lands of Willow Creek, including these various sections that I have called your attention to?

(Testimony of A. A. Derrick.)

A. Most of the people consider it a detriment to it.

Q. Most of the people consider the overflow water a detriment to it? A. Yes, sir.

Mr. HUNTINGTON.—Objected to as not responsive to the question and hearsay, incompetent and not the best evidence. [538—482]

Q. You may state your opinion as to whether or not it is an advantage or a detriment to the land.

A. I know that it is a detriment to my land.

Q. Do you know of other lands that it is a detriment to?

A. I know of different people that have made draining ditches to try to keep the flood water off the land.

Q. You know of different people who have made draining ditches to keep the flood water off the land?

A. Yes, sir.

Q. How many years has that course been pursued to your knowledge?

A. Ever since I have been in the country.

Q. Do you know the general reputation existing in the valley and amongst the people living there pertaining to the fact as to whether or not the overflow water is of advantage or a detriment to the land?

Mr. HUNTINGTON.—Objected to as incompetent, immaterial, not the best evidence and hearsay.

A. They consider it a detriment to this low land.

Q. Then, you mean by that that you know the general reputation as to that fact?

Mr. HUNTINGTON.—Objected to as leading.

(Testimony of A. A. Derrick.)

A. Yes, sir.

Q. You will say then that it is what, a benefit or a detriment? A. It is a detriment.

Q. How long have you known Mr. Leonard Cole?

A. Ever since I can remember.

Q. Do you know Mr. Insenhorfer? [539—483]

A. Yes, sir.

Q. Do you recall about the year 1894 or 1895 when Mr. Leonard Cole commenced mining up in the gorge? A. Yes, sir.

Q. Have you ever been up in the gorge?

A. Yes, sir.

Q. Had you been up in the gorge previous to the time he begun mining there? A. Yes, sir.

Q. Do you know the location of the dam now being constructed by the defendant company?

A. I know where it is at; I don't know the section.

Q. Have you seen the construction of the dam since they have been at work upon it?

A. Yes, sir.

Q. Were you ever in the gorge during the years 1894 or 1895 clear on down until 1907 while Cole and Insenhorfer were mining in there?

A. I have been through there every year since I have been in the country; I think.

Q. Have you ever observed the mining operations going on in the canyon?

A. I have seen where they had been mining on both sides and have seen men working there on one side, on the west side.

Q. In the gorge. Would that include the left-

(Testimony of A. A. Derrick.)

hand or the west side, and also the east side of the creek as you went up through the gorge?

A. I saw where work had been done on both sides of the creek.

Q. Where would that be in reference to where the dam is located; that is, whether above or below or at the place of the dam? [540—484]

Mr. HUNTINGTON.—You understand that my objection goes to all of this testimony relating to this mining ground and the operations there?

Mr. HART.—Yes, sir, that is all right.

WITNESS.—It is right above.

Q. Have you ever seen the evidence of mining below where the dam is located?

A. I don't think I ever did.

Q. If you did you don't recall of it?

A. No, sir.

Q. Was Mr. Cole or Mr. Insenhorfer in possession of the ground during the years 1895, 6, 7, 8, 9, 1900, '01, '02, '03, '04, '05, '06 and '07—were they in possession of the ground during those years?

Mr. HUNTINGTON.—Objected to as leading, and putting the words of counsel into the mouth of the witness.

Q. You may state whether or not they were in possession of the ground during those years.

Mr. HUNTINGTON.—Objected to for the same reasons.

A. They was.

Q. Was that possession a secret or open and notorious possession?

(Testimony of A. A. Derrick.)

Mr. HUNTINGTON.—Objected to as calling for the opinion of the witness, incompetent and immaterial, and being possibly one of the questions for the Court to determine [541—485] from the evidence and not for this witness to determine.

A. It was not secret so far as I know.

Q. You may state whether or not their operations could have been seen and known to anybody visiting there in that vicinity—could it have been seen and known by anyone visiting that vicinity?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. How far off were their operations from the county road or the road usually travelled?

A. I think about a mile and a half; that is, the old road; it used to be a county road.

Q. You may state whether or not it was generally known amongst the settlers and people living in Willow Creek Valley and in Malheur County and in that general vicinity—

A. It was.

Q. —that Cole and Insenhorfer were in possession and mining that property?

Mr. HUNTINGTON.—Objected to as leading, incompetent, and not the best evidence.

Q. —during those years? A. They was.

Q. How long have you been familiar with the property on both the east and west side of the creek, both above and below where the dam site was located? [542—486]

A. Ever since 1886.

Q. What has been the general reputation of that property since you have known it or as to whether

(Testimony of A. A. Derrick.)

or not it was mining ground?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence and the general objection stated before.

A. It is all it has ever been used for.

Q. Has it always been known or had the general reputation of carrying gold or mining or mineral?

A. Yes, sir.

Q. Do you know whether it had the reputation of mining ground—as being mining ground previous to the time when you came here?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence and leading.

A. There was an old ditch there and the ground had been dug over for an acre or two and showed it had been mined there a year or two before that.

Mr. HUNTINGTON.—Move to strike out the answer as incompetent, hearsay and not responsive to the question.

Q. Did you see the old ditch about the time you first came here?

Mr. HUNTINGTON.—Objected to as leading.
[543—487]

A. Yes, sir.

Q. At the time you came here did you hear or learn or ascertain or hear of the reputation which the ground had on both sides of the canyon and in the vicinity of where the dam is located?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. State whether or not it carried mineral.

(Testimony of A. A. Derrick.)

Mr. HUNTINGTON.—Objected to as leading, incompetent and not the best evidence.

A. It did.

Q. Generally the reputation would be what the people you would meet would talk about it being mining ground? A. Yes, sir.

Q. At that time how long had it been known and reputed to be mining ground?

Mr. HUNTINGTON.—Objected to as leading, incompetent and not the best evidence.

A. I don't know how long.

Q. You don't know how long it had been before?

A. No, sir.

Q. Excluding whatever value this land on both sides of the canyon may have for mining purposes as mining ground, has it any value, and if so what, for agricultural or any other purpose? [544—488]

A. It might have a value for grazing purposes.

Q. What would it be worth per acre?

A. Well, I could not say.

Q. What would be the value of it per acre as you would give it?

A. Well, it would not have very much value.

Q. Well, would it be ten cents or what per acre, just your general estimate of it, or known of it as being familiar with it?

Mr. HUNTINGTON.—Objected to as leading.

A. It might be worth a dollar an acre.

Q. Are you familiar with the canyon of the creek as it runs below where the dam site is until it reaches the Cole property and as it passes through Section 3

(Testimony of A. A. Derrick.)

of Township 15 South, Range 42 East?

A. Yes, sir.

Q. What is its reasonable value?

A. Why, it is the same kind of land we was just speaking of.

Q. What are the sides of the canyon up and down there? How high do they run?

A. Oh, I couldn't say.

Q. Well, about how high?

A. Possibly a quarter of a mile.

Q. Do you mean they are a quarter of a mile high?

A. I don't know; you have got to look twice to see the top of them.

Q. At any rate it is many hundreds of feet high, so as to be conservative? A. Yes, sir. [545—489]

Q. Now, are you familiar with the ground over in Section 15, Township 15 South, Range 42 East?

A. Yes, sir, I am acquainted with that land.

Q. What growth is on that land, if it has any growth upon it? A. Sagebrush.

Q. What is it worth per acre, the section up there, including the land that has the sagebrush and the hillsides and all of it?

A. Well, I would not think it would be worth over a dollar an acre at the outside.

At the hour of 11:55 o'clock A. M. adjourned until 1:30 o'clock P. M. to-day—July 26th, 1909.

At the hour of 1:30 o'clock P. M. July 26th, 1909, met pursuant to adjournment as above. Present: Same as before.

(Testimony of A. A. Derrick.)

Direct Examination of Mr. DERRICK (Continued)

by Mr. HART.

Q. Do you recall the names of the creeks flowing into Willow Creek on the east or right-hand side of the creek as you go up? A. Yes, sir.

Q. What are those with reference to the ones that flow into Willow Creek where the dam is?

A. There is Baker Creek, and Fox (or Fox) Creek and Stone Quarry Gulch, as I call it—some call it Dry Gulch.

Q. Do you recall the names of the creeks that flow into Willow [546—490] Creek below where the dam is and excluding Pole Creek on the left-hand side of the creek going up? A. Yes, sir.

Q. What are the names of those?

A. Black's Creek, Gum Creek, Sourdough, Little Willow Creek and Current Creek.

Q. Into what creek do all of these waters of these creeks you have mentioned finally flow?

A. Into Willow Creek.

Q. As the water from any one of these creeks flows into Willow Creek does it pass on any of the low lands owned by the complainant company that have been mentioned?

A. Before it gets to Willow Creek?

Q. Yes, sir. A. Some of them, yes, sir.

Q. Have you ever observed whether those creeks, or what is the fact, rather, as to the volume of water which may be carried in either of those creeks at various times as compared with the volume of water which may be in Willow Creek at the same time?

(Testimony of A. A. Derrick.)

A. Well, I have seen more water in those creeks than there was in Willow Creek at the same time.

Q. When Willow Creek overflows its banks does water from these various creeks contribute to that overflow? A. Yes, sir.

Q. I asked you about the mining locations of these men, what you knew about the dam site and mine, didn't I? A. Yes, sir. [547—491]

Cross-examination by Mr. HUNTINGTON.

Q. You live in Section 10, what township and range? A. Township 16 South, Range 43 East.

Q. How much land have you there?

A. I have 20 acres in Section 10—no, wait; I have 140 acres in Section 10.

Q. Have you any other land?

A. This 40 acres in Section 3.

Q. So that you have 180 acres altogether?

A. I have 200 acres.

Q. Now, in what other section?

A. It lays in Section 10 and Section 3. I was thinking of my home place 120, but my place there was 40 acres.

Q. There is 120 acres in your home place?

A. 160 acres.

Q. Then, you bought 40 acres?

A. I had 120 acres, and this spring I bought 80 acres more.

Q. So that in Section 10 you now own 160 acres and 40 acres in Section 3, is that right?

A. Yes, sir.

Q. Is that all in a body? A. Yes, sir.

(Testimony of A. A. Derrick.)

Q. And that land is served or irrigated by water from what is known as a "company" ditch?

A. Yes, sir.

Q. That same ditch irrigates the Tage & O. K. ranch?

A. I have water in two ditches.

Q. What is the other ditch? [548—492]

A. I call it the Grimes ditch.

Q. Now let us confine ourselves to the company ditch: The company ditch serves that land?

A. A part of it; yes, sir.

Q. The company ditch serves part of your ranch and also the Tage & Olk ranches?

A. Yes, sir.

Q. The Tage and Olk ranches have been conveyed to Mr. Brogan or to the defendant company, haven't they?

A. Yes, sir.

Q. So that now you are joint owners, or one of the joint owners with the defendant company of that company ditch?

A. Yes, sir.

Q. Now, is the same thing true as to the Grimes ditch?

A. No, sir.

Q. Who owns the Grimes ditch besides yourself?

A. Well, there is about 50 acres interest; there is Mr. Oxman, myself, Mr. Tage, Mr. Kelly has an interest in the ditch.

Q. How much of your land is irrigated by the company ditch?

A. About fifty acres.

Q. And how much by the Grimes ditch?

A. About 150.

Q. Does the creek run through your land?

A. The old creek channel used to run through one

(Testimony of A. A. Derrick.)

corner of my land.

Q. Did you acquire title to your land from the Government? A. No, sir.

Q. No part of it? A. No, sir.

Q. Do you know whether or not the title to your 200 acres passed out of the Government prior to or subsequent to 1877? [549—493]

A. Since that, I think.

Q. When was it that you lived on the Cole place—what years? A. 1892, 3 and 4.

Q. Then, did you move immediately onto this land you are living on now? A. Yes, sir.

Q. And lived there ever since? A. Yes, sir.

Q. Where were you living prior to 1902 (1892)?

A. On Upper Willow Creek.

Q. Away up above the Malheur City?

A. Yes, sir; I lived there four years.

Q. You are familiar with the method of using the water along Willow Creek since you have lived there, I suppose? A. Yes, sir.

Q. The people who use water through the ditches begin to use it in ordinary seasons as early as February, do they not? A. Not generally; no.

Q. Doesn't Mr. Scott and Mr. Faulkner and those people down there begin to use it just as soon as it begins to flow? A. Yes, sir, I believe they do.

Q. That is true with all of the people in the lower part of the valley that have water ditches?

A. Yes, sir, most of them.

Q. Now, you say that the flood waters only come down occasionally, as I understood you on your direct

(Testimony of A. A. Derrick.)

examination: Do you mean to say by that that it is more often there are no flood waters than that there are?

A. What I meant by that, it is more often that it does not flow out of the banks of the creek that it does.

Q. Then, you mean to say that in the majority of years the waters [550—494] never flow over the banks of the creek? A. Yes, sir.

Q. What years—I wish you would name them off if you can what years during the past nine years that the water has not overflowed the banks?

A. Well, there might be some particular places in the creek that it overflowed the banks every year. There are places in the creek that has no creek channel at all to speak of.

Q. Well, then, where do you—then you mean when you speak of it as not overflowing the banks years when it does not overflow all of the banks, is that your idea about flood water? A. Yes, sir.

Q. Well, now, most of the years it overflows the banks in many places where the overflowed water will stand back from the creek as much as a half mile, doesn't it, in places?

A. I don't know of any places of that kind.

Q. Do you know of any where it overflows as much as a quarter of a mile? A. No, sir.

Q. Take it in the ordinary years, Mr. Derrick, how far away from the banks of the creek does the flood waters get—do the flood waters get?

A. What point have you reference to?

Q. Any point along the creek from the mouth of

(Testimony of A. A. Derrick.)

the canyon above Cole's down to the Faulkner place, say?

A. Most of the distance it hardly ever gets out of the bank; most all the distance.

Q. Then, only in very few years are there any so-called flood waters coming down through the canyon of Willow Creek? [551—495]

Mr. HART.—Objected to as incompetent as witness has already answered. He said he meant by the way he used the word flood waters that it overflowed.

A. Yes, sir, I think just a few years.

Q. Then a reservoir constructed in the canyon for the purpose of deterring and storing the flood waters and no other would get water only occasionally?

Mr. HART.—Objected to as incompetent, irrelevant and immaterial.

A. Why, I think they would get water most every year.

Q. But that was built for the purpose of storing flood waters and no other. They would not get any flood water unless it came down? A. No, sir.

Q. And you say the flood waters come down only occasionally? A. Yes, sir.

Q. And so it would be only occasional years when they can get any flood water? A. Yes, sir.

Q. Now, Mr. Derrick, you and Mr. Emory Cole have been quite intimate friends for a good many years? A. Yes, sir.

Q. He is interested very largely in the defend-

(Testimony of A. A. Derrick.)

ant corporation, isn't he?

Mr. HART.—Objected to as incompetent as witness knows nothing about it if there is any such a thing exists and it is simply hearsay and immaterial.

[552—496]

A. Not that I know of.

Q. Do you mean to say you don't know, either from conversation with him or from other sources, that he is—that he was one of the promoters of this enterprise, and don't you know that he was?

Mr. HART.—Objected to as incompetent, immaterial and irrelevant.

A. No, sir.

Q. Haven't you heard him say that he was interested in that enterprise? A. No, sir.

Q. Never did? A. No, sir.

Q. Never has talked with you about that?

A. He has talked to me about selling his property to them.

Q. And about the terms of the sale?

A. No, sir.

Q. Never did? A. No, sir.

Q. You know that he has been in attendance upon this trial—upon this hearing ever since it began, and has been one of the principal advisers of the counsel for defendant—I should say Leonard Cole. I meant Leonard Cole; I did not mean Emory Cole; in speaking of Emory Cole I meant Leonard Cole. Now, don't you know, as a matter of fact, that Leonard Cole is extensively interested in the defendant company? A. No, sir.

(Testimony of A. A. Derrick.)

Q. You don't know anything about that? [553—497]

Mr. HART.—Objected to as incompetent and immaterial.

A. No, sir.

Q. You know that he has been here as one of the principal advisers of counsel in the hearing and taking of the testimony and getting the witnesses and all that sort of thing?

Mr. HART.—Objected to as incompetent and hearsay.

A. No, sir, I don't know that.

Q. Referring now to Sections 5, 9, 23 and 25: I did not understand you to say that you have ever surveyed the overflowed lands on those sections?

A. No, sir.

Q. Have you ever run the lines bounding those sections?

A. I have run the lines of most of them; yes, sir. That is, I helped at it.

Q. All that you undertake to say about the overflowed land, then, is from your observation as you have passed up and down? A. Yes, sir.

Q. Gum Creek does not discharge water into Willow Creek the year around, as I understand it?

A. No, sir.

Q. And after the snow is gone from the hills there is not very much water flowing anywhere in the creek? A. No, sir.

Q. But, as I understand you, or some of the wit-

(Testimony of A. A. Derrick.)

nesses—I am not sure whether it was you—there was a little water at places in the creek that seems to rise and sink? Is that right?

A. Yes, sir. [554—498]

Q. Are your irrigated lands of the same general character as these overflowed lands on Sections 5, 9 and 23? A. No, sir.

Q. Are they higher? A. Yes, sir, most of it.

Q. Is any of it as low as these lands or any part of them?

A. There is a portion of it; yes, sir.

Q. Suppose you should deprive that land, which is as low as these lands I have referred to, of all water every year would you expect to raise any crop? I mean all water except rain and snowfall?

A. This low bottom land is usually wet enough.

Q. That raises a crop of hay without being irrigated? A. Yes, sir.

Q. And you think if you were to keep the water off of it entirely you would benefit it?

A. Well, that low land subirrigates.

Q. Answer my question. (Previous question read to witness.) A. Yes, sir.

Q. That is below your irrigated land, however?

A. Yes, sir.

Q. And it gets moisture enough from the drainage of your higher irrigated land so that if you do not irrigate this low land at all it would produce a crop? A. Yes, sir.

Q. Suppose you should not irrigate your higher land and should not irrigate this low land, do you

(Testimony of A. A. Derrick.)

think then that it would be better off without any water at all except what it got from the rain and snow? A. No, I don't know as it would.

Q. It would not raise anything hardly, would it?
[555—499]

A. Well, it didn't raise much this year.

Q. If it had had one good, thorough irrigation in the spring and no more, and did not receive any of the drainage water from the upper land; in other words, if you did not irrigate your higher land it would raise a crop of hay?

A. If the low land was irrigated and the upper land was not?

Q. If it got one good, thorough wetting and the other not any?

A. Yes, sir, it would raise some hay.

Q. When you are irrigating land in this valley and flood it with irrigating water does the land adjoining that where the water actually stands get any benefit from the soaking? In other words, doesn't the water have a tendency to spread out underneath the surface and subirrigate the adjoining lands?

A. Yes, sir.

Q. Now, you have said that most of the people claimed that this overflowing of their land is detrimental? A. Yes, sir.

Q. Who have you heard say that?

A. Why, I have heard several say that.

Q. Well, name them?

A. Well, Mr. Cole and Mr. Grimes and Mr. Kelly.

(Testimony of A. A. Derrick.)

Q. Anybody else?

A. I think that is all—Mr. Lockett.

Q. You never heard Mr. Faulkner, Mr. Scott, Mr. Norwood, Mr. Olk say that, did you, or Mr. Edwards?

A. Well, I had the Norwood ranch leased and Mr. Wells, the Administrator, gave me a contract to put the ditch down through it to drain it.

Q. (Previous question read to witness.)

A. No, sir. [556—500]

Q. When did you ever hear Mr. Grimes say that?

A. Oh, a number of times.

Q. If Mr. Grimes made an affidavit and swore to it in this case in which he stated that it would be a detriment to the lands not to have the overflow water come onto them in the spring, then do you mean to say that he would swear contrary to what he told you?

Mr. HART.—Objected to as incompetent, irrelevant, immaterial, not proper impeachment and that no such affidavit has been made actually. He has not the right by this witness to call upon the truth of Mr. Grimes. If he made such a statement you can call upon Mr. Grimes and bring him in here.

A. Yes, sir.

Q. Now, Mr. Derrick, where was the land which you say you were employed to drain?

A. Well, the ditch ran across one corner of Section 23.

Q. That was to allow the stagnant water that was left after the receding of the flood waters to drain

(Testimony of A. A. Derrick.)

off a low piece of land?

A. A. Mr. Turner at that time had a big draining ditch down through his field, and it ran down to Mr. Grimes' lower fence and quit there, and the water from there would spread out all over the bottom.

Q. And it kept the ground too wet for too long a time?

A. Yes, sir, and we extended that ditch on down to the old creek channel.

Q. The tract on the Kelly place concerning which you say Mr. Kelly said the overflow waters were detrimental is a tract [557—501] of land where the water is held after the receding of the flood waters in the valley so that they cannot escape, isn't that true?

A. There is a place there of that kind.

Q. When was the first time you were ever up the canyon above the valley? A. In 1886.

Q. 1886? A. Yes, sir.

Q. Was anybody working there at that time?

A. No, sir.

Q. What time of the year was it?

A. I don't just remember; I was up there several times during that year.

Q. During the spring and summer?

A. Yes, sir.

Q. When is the usual mining period in this country? A. In the spring of the year.

Q. While the water is high? A. Yes, sir.

Q. When were you next there, or were you there

(Testimony of A. A. Derrick.)

every year from that time on?

A. That is up the gorge above Cole's place?

Q. Yes, sir.

A. I think I have been there every year since that time.

Q. Do you remember of seeing anybody there in 1887? A. Mr. Boswell lived there in 1887.

Q. Was he doing any mining?

A. I don't believe he was.

Q. Did you see anybody doing any mining there in 1888? A. No, sir. [558—502]

Q. Did you see anybody mining there at any time prior to 1895 when you say Mr. Leonard Cole was mining there? A. Not right in that canyon.

Q. Not anywhere along near where that dam site is or for a couple or three miles above that?

A. Yes, sir.

Q. You mean that you did not see anybody?

A. I did not; yes, sir.

Q. How long was Leonard Cole, to your knowledge, working in the canyon in 1895?

A. I couldn't say; I never seen Mr. Cole working there personally at all.

Q. Well, then, all you know about his working there was hearsay?

A. And I saw where the work was done.

Q. If you did not see him doing it you do not know who did? A. No, sir.

Q. Who did you see working there in 1895, if anyone? A. Why, I couldn't—in 1895?

Q. 1895?

(Testimony of A. A. Derrick.)

A. I don't know that I seen anyone in 1895.

Q. Do you remember seeing anybody working there in 1896? A. I don't know that I did.

Q. Do you remember seeing anybody working there in 1897?

A. I think there was some Chinamen working there in 1897.

Q. Do you know how long they worked there?

A. No.

Q. Do you remember seeing anybody working there in 1898? A. I don't think I did.

Q. In 1899? A. No, sir.

Q. In 1900? [559—503]

A. No, I don't think I did.

Q. In 1901?

A. I never was up in there through that canyon very many times in the working season and mining season; generally in the fall of the year and when gathering cattle.

Q. I thought you said you were up there in the spring and summer?

A. I think I said most every year.

Q. I think I asked you if you were there in the spring and summer?

A. I have been there several times in the spring and summer.

Q. When was the first time you ever saw anybody yourself doing any mining up there anywhere near where that dam is located?

A. I think it was in 1893.

Q. 1893—

(Testimony of A. A. Derrick.)

A. Yes, sir—or 1903, I should say.

Q. That was the first time? A. Yes, sir.

Q. Were you in that canyon more than once a year? A. Yes, sir.

Q. Several times a year? A. Yes, sir.

Q. You were hunting for stock? A. Yes, sir.

Q. The stock ranged up in through there, did they, along the sides of the hills?

A. They generally lodged there in the winter time.

Q. Then you would not be hunting for them in the fall or latter part of the summer season unless you saw them there?

A. We generally rode in there the latter part of the summer.

Q. And they pasture more or less over the hills there and [560—504] in the canyon?

A. Yes, sir.

Q. So that when you say that Mr. Cole and Mr. Insenhorfer have been in the open and notorious possession of that property ever since 1895 you were stating that from what you have heard?

A. Yes, sir.

Q. From your observation a person might have passed up and down that canyon a great many times during the year and never have seen them in there at all during that period?

A. They might have.

Q. And not have been aware of the fact that they were claiming the right to the possession of that land?

(Testimony of A. A. Derrick.)

Mr. HART.—Objected to as incompetent.

A. They had a house there and I think there was someone generally there.

Q. But you did not see anybody there except upon the occasions you have spoken of?

A. Yes, sir, that is all.

Q. Well, if a person going up and down there and looking could see if anybody was in possession of their land they would have seen this little cabin which was a cabin something like a half-mile above the dam site and on the right-hand side going up and they would have seen where there had been someone working in the gravel and that is all—they might have seen the water ditch, of course—that is all they might have seen showing possession? None of that land was enclosed? [561—505]

Mr. HART.—Objected to as incompetent and immaterial, as this witness does not know what anybody might have seen.

Q. That land was not enclosed by fence?

A. No, sir.

Q. And you saw no evidences of any mining, as I understood you, below the dam site in the canyon?

A. I don't ever remember of seeing any.

Q. Do you know where the lines are between Sections 21 and 28 up there in the canyon?

A. No, sir.

Q. So that you would not know anything about where this mining was done; that is, whether it was on Section 21 or Section 28? A. No, sir.

Q. You have stated that, eliminating the question

(Testimony of A. A. Derrick.)

of mineral value of that land, you think it has no value except for grazing purposes. Wouldn't it have some value for reservoir purposes and storing flood waters in the canyon?

Mr. HART.—Objected to as incompetent and immaterial and not an element of damages, calling for the opinion of the witness on something the witness has not shown himself competent to answer and not proper cross-examination.

A. Yes, sir, it might have.

Q. And, if you were the owner of that land wouldn't that fact enter into consideration as a possible value of the land if you were fixing a price upon it? [562—506]

Mr. HART.—Objected to as incompetent and immaterial, calling for the opinion of the witness and not proper cross-examination.

A. I think I would.

Q. All of these creeks you have mentioned as coming into the valley of Willow Creek both from the east and the west discharge their waters, when they discharge any waters, into Willow Creek above Dell, don't they? A. No, sir, not all of them.

Q. Which ones do not?

A. The Turner Gulch and Little Willow Creek and Current Creek comes in below Dell.

Q. How far?

A. Turner Gulch is about a mile below; Little Willow Creek about three miles, and I think Current Creek is about five miles.

Q. How do they compare—or all of these come in

(Testimony of A. A. Derrick.)

above the Scott place, don't they? A. No, sir.

Q. Which one comes in below Scott's place?

A. Current creek.

Q. Does Little Willow Creek, Current Creek and Sheep Corral Creek that come in below Dell, do they flow water the year around? A. No, sir.

Q. There is no water flowing in them after the snow is gone? A. No.

Q. When lands are irrigated, and as long as they are irrigated during the season, the land immediately below them in the valley are to some extent benefitted aren't they? [563—507] A. Yes, sir.

Q. The ground is kept more or less moist after the water comes out into the channel of the creek, more than it otherwise would be? A. Yes, sir.

Redirect Examination by Mr. HART.

Q. Mr. Derrick, you spoke of a reservoir site: There is any number of reservoir sites clear along up into Cow Valley, isn't there?

A. I think that is all it is good for.

Q. That whole canyon for miles up is only good for reservoir sites? A. Yes, sir.

Q. Well, with the whole creek full of reservoirs they are not worth anything?

A. They don't seem to be changing hands very fast.

Q. That has been the way for a good many years?

A. Yes, sir.

Q. So far as the reservoir sites are concerned, they didn't change hands very fast from the fact they are worth nothing? A. No, sir.

(Testimony of A. A. Derrick.)

Q. Counsel asked you whether or not you could tell where mining was done on Sections 21 and 28 and made enquiry of you if you knew where the sections lines were: You don't [564—508] know where they are? A. No, sir.

Q. All that you do know is as you testified, as I understood you to say, that mining was done on both sides of the gulch from where the reservoir is clear on up for miles? A. Yes, sir.

Q. On both sides of the gulch? In the various years you visited there, you did not testify as to the number of persons you could see mining? The fact, as I understand it, is that you happened to visit there in the seasons of the year that mining was not going on for lack of water? A. Yes, sir.

Q. State whether or not you could see where mining had been done—where the work was going on.

A. Yes, sir.

Q. Now, counsel asked you, or made enquiry from you as to flood water flowing into the reservoir: I will ask you this question: If flood water can flow into the reservoir and still not be enough flood water to constitute a big overflow?

Mr. HUNTINGTON.—Objected to as leading, incompetent, irrelevant and not the best evidence.

A. Yes, sir.

Q. There is flood water every year but the flood water does not amount to sufficient to form an overflow every year?

Mr. HUNTINGTON.—Objected to as leading.

Q. State whether or not that is what you meant

(Testimony of A. A. Derrick.)

to convey. [565—509]

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Recross-examination by Mr. HUNTINGTON.

Q. When the water is coming down the canyon you think it is flood water and can be stored, but when it gets out into the valley then it is not flood water and cannot be stored?

Mr. HART.—Objected to as misleading—the witness has clearly stated what he said flood water was.

Q. In cross-examination you were asked as to what you meant by flood water, as nearly as I can remember, and you stated in substance that it was such a quantity of water as was in excess of the capacity of the ordinary channel of the creek. Now, that is what you meant by flood water, is it?

A. That is what I call it.

Q. And in ordinary years there is no flood water the most of the years? A. Yes, sir.

Q. Then, assuming that your definition of flood waters is correct, of course there would not be any flood waters coming down the canyon if there were no flood waters when it got into the valley? It is the same water that comes down the [566—510] canyon that comes into the valley?

Mr. HART.—Objected to as incompetent as the side creeks send through a lot of water into Willow Creek.

A. Generally the same; yes, sir.

Q. Now, the reservoir site in a canyon is a place

(Testimony of A. A. Derrick.)

particularly suited for building a reservoir, as you understand it?

Mr. HART.—Objected to as incompetent, witness has not shown himself qualified, not proper cross-examination and immaterial.

A. I don't hardly understand that question.

Q. Well, a reservoir site is a place that is adapted to the building of a reservoir, isn't that what you mean by a reservoir?

Mr. HART.—Objected to as incompetent, witness not having shown himself qualified, not proper cross-examination and immaterial.

A. Yes, sir, that is what I would call a reservoir site.

Q. Now, taking this particular spot where the defendant company has commenced the construction of its dam, the canyon narrows there, doesn't it?

A. Yes, sir.

Q. And on each side there is quite a high bluff of rock?

A. Yes, sir. [567—511]

Q. And above that there is a little widening of the canyon?

A. A little bit; yes, sir.

Re-redirect Examination by Mr. HART.

Q. And you find similar places just like that all up and down the canyon?

A. Yes, sir.

Q. And while this might hold 7100 acre-feet there are places up there that will hold 40,000 acre-feet?

Mr. HUNTINGTON.—Objected to as leading and incompetent.

Q. Isn't there larger sites farther up the canyon?

A. It widens out and gets bigger.

Witness excused. [568—512]

[**Testimony of C. W. Anders, for Defendant.**]

C. W. ANDERS, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. What business are you engaged in?

A. Mining.

Q. How long have you been engaged in the mining business? A. Oh, about 12 years.

Q. How long have you lived in this county?

A. I don't live in Malheur County.

Q. Whereabouts do you live?

A. I live in Huntington—Baker County.

Q. You live in Baker County. How long have you lived there then? A. About 13 or 14 years.

Q. Are you familiar with the ground—the mining ground—located in the canyon? Or do you know where Emory Cole lives?

A. Yes, sir, I have been there.

Q. Are you familiar with the mining ground in the canyon from Emory Cole's and from there on up, clear on up for several miles?

A. Not right from Emory Cole's.

Q. I mean above Emory Cole's?

A. I am acquainted with the mining ground in Willow Creek canyon above Emory Cole's.

Q. How long have you been acquainted with that mining ground? A. I believe in 1895.

Q. You have been acquainted with it since 1895?

A. Yes, sir. [569—513]

Q. Do you know where the defendant company

(Testimony of C. W. Anders.)

is constructing its dam in the canyon?

A. Yes, sir.

Q. Have you seen where that work is?

A. Yes, sir.

Q. Do you recall a prominent butte or mountain peak called a butte right on the side *where*?

A. Yes, sir, where the dam is built.

Q. The dam is built where the butte is?

A. Yes, sir.

Q. When were you first in the canyon?

A. About 1895.

Q. From that time on how often have you been in there? A. About every year since.

Q. What seasons of the year would you visit there? A. Spring and fall, and summer.

Q. Did you do any mining in there yourself?

A. Nothing but prospecting.

Q. You did do some prospecting work on that creek in there? A. Yes, sir.

Q. Did you prospect any below *there* the dam is now located? A. Yes, sir.

Q. Along where the dam is located?

A. Yes, sir.

Q. Did you prospect any above where the dam is located? A. Yes, sir.

Q. Now, did you find mineral and gold in your prospecting—what did you find in your prospecting?

A. I found gold.

Q. Was it either above or below the dam?

A. Oh, both above and below. [570—514]

Q. You found gold when you were prospecting

(Testimony of C. W. Anders.)

both above and below the dam? A. Yes, sir.

Q. Did you prospect on only one or both sides of the creek? A. On both sides of the creek.

Q. Did you find gold on both sides of the creek?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Did you see mining operations carried on in the canyon? Yes, sir.

Q. Where did you see those in reference to the location of the dam site?

A. Just above the dam with hydraulic works, just close to where the house is built now, down this way from the cabin.

Q. Right close to where the dam is?

A. Above the dam.

Q. Above the dam? A. Yes, sir.

Q. What was used in carrying on those hydraulic works?

A. Pipes leading across the creeks to giants.

Q. Were pipes on one or both sides of the creek?

A. Both.

Q. Did you see any work being done below where the dam site is located?

A. Yes, sir, just below.

Q. When you were prospecting there what did you find—about what class of ground?

A. I found pretty fair prospecting ground.

Q. About what was it in the pan? [571—515]

A. From a few colors up to about three cents.

Q. How much would it average?

A. Well, I never averaged it up, but somewheres

(Testimony of C. W. Anders.)

near a cent probably what I panned.

Q. Do you know how many pans—did you ever figure it takes to make a cubic yard of earth?

A. For a ton I figure on a ton prospecting to get a sample—I figure on about from 100 to 125 pans according to the wieght of the gravel or dirt.

Q. I don't know anything about the ton system.

A. Heavy gravel might weigh a little more. It runs from about 100 to 125 pans.

Q. How does that figure out in cubic yards?

A. Somewheres near about the same I calculate.

Q. Do you know whether mining operations were carried on in the gulch as you have indicated down until, we will say, about 1907?

A. Yes, sir, they were worked out there.

Mr. HUNTINGTON.—Objected to as leading.

A. (Continued.) Mr. Insenhorfer worked out there.

Q. Did you ever see Mr. Insenhorfer working out there? A. Yes, sir.

Q. What years did you see him in there?

A. I saw him in there from the time I first commenced prospecting in there; that is the time Mr. Cole and Mr. Martin and Washburn and them fellows were mining in there until 1907.

Q. Did you ever see Mr. Leonard Cole working in the canyon?

A. I saw him in the canyon and was with him in the canyon—managing the work. [572—516]

Q. What is the character of the ground on both

(Testimony of C. W. Anders.)

sides of the canyon, both sides of the creek, from say half a mile below where the dam is up to five or six miles above where the dam is? What is the character of the ground as to whether it carries mineral or not?

A. It is gravel bars, both sides of the creek all the way up to Basin Creek from below where the dam is now, say a quarter or half a mile below, you will find placer ground or gold-bearing ground.

Q. What is the land generally known as—placer ground or mineral ground?

A. As placer mining ground?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and leading.

Q. How long has it been called that to your knowledge?

A. I have been told for more than thirty years.

Mr. HUNTINGTON.—Move to strike out as hearsay and not the best evidence.

Q. What do you know about its general reputation as to whether it has been known as mining property?

Mr. HUNTINGTON.—Objected to as hearsay and not the best evidence.

A. It has been called a placer mine.

Q. Does that apply to only one or both sides of the creek? A. Both sides of the creek. [573

—517]

Cross-examination by Mr. HUNTINGTON.

Q. You say that you are a miner?

A. Yes, sir.

(Testimony of C. W. Anders.)

Q. How long have you been engaged in mining?

A. I have been engaged in mining for about 12 years, mining for myself.

Mr. HART.—Do you know who was in possession of the property on both sides of the creek, along where the dam is located, speaking generally from the years 1895 until 1907?

Mr. HUNTINGTON.—Objected to as incompetent and calling for the conclusion of the witness.

A. Mr. Insenhorfer and Leonard Cole.

Mr. HART.—Was their possession secret or public, or how?

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. They never seemed to hide that they did not own it—they always claimed they owned it to me and everybody else that I know of.

Mr. HART.—Were you acquainted with other people who visited that ground during those years and who lived in that general vicinity? A. Yes, sir.

Mr. HART.—Amongst the people who came or visited around that property during those years what was the reputation of that property as to who owned it and who was in open and public [574—518] possession of it?

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. Leonard Cole and Insenhorfer.

Mr. HUNTINGTON (Cross-ex. Continued).

Q. How long did you say you have been mining?

A. For myself about twelve years.

(Testimony of C. W. Anders.)

Q. Are you still mining? A. Yes, sir.

Q. What were you doing prior to that time?

A. Well, I was contracting before that, but still I was prospecting ever since I was seventeen.

Q. How old are you?

A. I will be 47 this fall.

Q. So that off and on you have been mining ever since—for the last thirty years?

A. I have prospected, not mined; then I went to mining twelve years ago.

Q. What is the difference?

A. A whole lot of difference. Prospecting is going around through the hills; mining is ground or a piece of property that is supposed to be worth—or valuable.

Q. Who were you working for when you were prospecting? A. I was working for myself.

Q. Did you prospect all the way up the canyon from the lower end of the canyon?

A. From about a quarter of a mile below the dam, or something like that; it may have been a little farther—it might have been half a mile, I didn't measure it. [575—519]

Q. What year was that?

A. I have been there all the way from 1895 up to a few years ago.

Q. And prospected every year up through the canyon?

A. Not every year. My brother lives right there near and I went down there prospecting.

Q. Every time you went down there you pros-

(Testimony of C. W. Anders.)

pected? A. No, not every time.

Q. Can you give us an idea how many times since 1895 you have been in the canyon prospecting?

A. Five or six years.

Q. Can you indicate about what years they were?

A. Oh, 1895 up to '96, 7 and 8; somewhere in there.

Q. As late as 1898? A. Yes, sir.

Q. And later than that?

A. Yes, sir, I have been down there. Let's see, I was down there in 1905.

Q. You were prospecting then?

A. Yes, sir, I was camped on Basin Creek and prospected in all of Willow Creek Canyon right then.

Q. Did you prospect over this particular locality?

A. Yes, sir.

Q. Who was there at that time?

A. Mr. Insenhorfer had charge then.

Q. Why were you prospecting on that ground?

A. To satisfy my own self.

Q. When you were there in 1895 who was there?

A. I believe that was the year that Mr. Martin and Mr. Washburn were there.

Q. What were they doing there? [576—520]

A. Hydraulic mining.

Q. Do you know how long they mined there?

A. No, I didn't keep any time on them.

Q. Did you find someone there every time you went down to prospect?

A. Oh, I don't know as I did every time; I don't know as I seen them every time I went down the can-

(Testimony of C. W. Anders.)

you. I wasn't looking for them.

Q. Did you satisfy your curiosity by your prospecting? A. Yes, sir.

Q. Why did you go there prospecting more than once?

A. The property was for sale and I had correspondence with people who wanted to buy mining property.

Q. You were then investigating with a view of negotiating a sale of it?

A. Yes, sir, I had a price for it.

Q. What was the price of it?

Mr. HART.—Objected to as incompetent and immaterial.

A. That was their part of it.

Q. You never found out their price of it?

A. I guess they had their price.

Q. But it took you four or five different years to satisfy yourself about the price? A. Why, no.

Q. And during all that time you didn't know what they were asking for it?

A. They said they would set the figure after I got the mine there.

Q. Did they indicate anything about their terms for it? [577—521]

A. Yes, sir; I think something like \$30,000 they wanted for it.

Q. They wanted something like \$30,000 for it?

A. I think so.

Q. How much ground did that cover?

A. It covered from the mouth of Mormon Basin

(Testimony of C. W. Anders.)

Creek down to below where the reservoir dam is now.

Q. You knew they never had acquired title to the property, didn't you?

A. I never knew anything about the title.

Q. You were willing to investigate the ground and spend three of four years prospecting, but you never looked at the title?

Mr. HART.—Objected to as incompetent, irrelevant and not proper cross-examination.

A. They agreed to furnish title.

Q. Who did? A. Insenhorfer and Cole.

Q. What did Washburn have to do with it?

A. I suppose he probably bargained for it.

Q. Did he claim to be one of the owners of it?

A. I don't think he claimed to; he didn't tell me he owned any of it.

Q. But you never did succeed in finding a purchaser for it?

A. Yes, sir, I did, but there was other contracts ahead of mine, and I couldn't hold my men long enough.

Q. When did you find a purchaser for it?

A. The first in 1895.

Q. Who was the purchaser?

A. A company from Utah—a placer mining company. I forget their names. I know their name, but I can't remember—I [578—522] know their names.

Q. Did they come out to look at it?

Q. Yes, sir; they came out to look at it.

Q. What was his name? But you do not remem-

(Testimony of C. W. Anders.)

ber his name? A. No, sir.

Q. When was that? A. In 1895.

Q. That is the only time you ever found a purchaser for it? A. Yes, sir.

Q. And he was to pay \$20,000?

A. \$30,000, I think. I think that was the price asked.

Q. There was a house there at that time?

A. There was an old house up at the mouth of what is called Boswell Creek, the way I understand it.

Q. How far below there did they do hydraulic mining? A. Below that house?

Q. Yes, sir.

A. They done mining all the way for probably a couple or three miles.

Q. They did hydraulic mining all the way for a couple or three miles?

A. Not hydraulic mining for three miles below, but they done hydraulic mining just where they got the new house now or moved it to.

Q. That is above the dam site?

A. Yes, sir; that is above the dam site. I seen where somebody had been ground-sluicing from the ditch.

Q. From the side of the hills?

A. Where the dam is now I saw where it looked like ground sluicing had been done just below where the reservoir is now. There was no reservoir then, but as near as I can place it it [579—523] was just about there.

Q. But you don't mean to say the ditch went down

(Testimony of C. W. Anders.)

below where the dam site is?

A. Not just then; they extended it since.

Q. When?

A. 1903, I think, the other work. I don't know who done the ground sluicing, but I saw that there since.

Q. And you don't know who extended the ditch?

A. I think—

Q. Say if you know?

A. Robert Wood was there working on the ditch.

Q. And that ditch, then, was extended down below the dam site?

A. About even with it or somewheres close to it.

Q. You think it was about even with the dam site?

A. Yes, sir; it might have been a little past. I didn't exactly measure it; I wasn't there measuring it exactly.

Q. You did not measure it to see?

A. No, but I know the ditch was there some place.

Q. How many pans did you say there was to a ton?

A. From 100 to 125 pans. You can pan it in 100 if you can pan 20 pounds to the pan; I can do that.

Q. Then you call that pretty rich placer ground you have in this country?

A. Just medium placer ground.

Q. That placer, according to your judgment, was well worth working?

A. Yes, sir; that is what I thought.

Q. And if you had it you would have thought it well worth acquiring title to?

(Testimony of C. W. Anders.)

A. Why, of course, if I had the ground for mining purposes.

Q. Did you ever look at the placer filings of Insenhorfer [580—524] and Cole?

A. I saw maps.

Q. You knew they had not located any ground below where this dam is—

Mr. HART.—Objected to as incompetent, irrelevant, immaterial, not proper cross-examination, calling for the conclusion of the witness and is contrary to the record.

A. I supposed they owned it clear down to where the dam is now and below.

Q. You knew they had not located on the ground in the canyon?

A. That is what they told me, they had it located—from the map it looked like they had it all covered.

Q. The entire canyon?

A. From the mouth of Basin Creek down to just below where the reservoir is now.

Q. You understood all that was covered by their filings?

A. I supposed so. There might have been a little corner or something that did not exactly square in.

Q. Couldn't you tell?

A. It looked from his map as though it was pretty well covered.

Q. If it hadn't been covered you would have located it yourself?

A. If I didn't have no water for it, I wouldn't be bothering somebody else.

(Testimony of C. W. Anders.)

Q. Have you been engaged in any other business than mining during the last ten years?

A. Oh, I have worked at odd jobs. I am mining now and have been for a long time.

Q. What is your brother's name? [581—525]

A. Albert Anders.

Q. How far does he live from this so-called placer ground?

A. I suppose it must be about a mile from the Mormon Basin Creek, I think.

Q. And about how far from the dam site?

A. It must be three or four miles down there; I don't know exactly.

Witness excused. [582—526]

[Testimony of John Thompson, for Defendant.]

JOHN THOMPSON, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Where do you live? A. In Huntington.

Q. How long have you lived at Huntington?

A. About 13 years.

Q. You have lived at Huntington 13 years?

A. Yes, sir. Then I have lived up the river not more than 25 miles or so from Huntington for 31 years.

Q. How long have you lived in this general vicinity—this part of Oregon?

A. Thirty-one years.

Q. Thirty-one years? A. Yes, sir.

Q. Are you familiar—do you know of the loca-

(Testimony of John Thompson.)

tion of the mining ground in the canyon of Willow Creek?

A. Yes, sir; I have been over a part of it.

Q. Do you know how long they have been mining gold in that canyon?

Q. Well, I seen men working there in 1879.

Q. You saw men working there in 1879?

A. Yes, sir.

Q. That is thirty years ago? A. Yes, sir.

Q. Whereabouts was he working at that time?

A. Working at the mouth of Mormon Basin canyon where it empties into Willow Creek. [583—527]

Q. Was that canyon known as mining property at that time? A. Yes, sir.

Q. What was he mining for?

A. Mining for gold.

Q. Did you ever see mining carried on in the canyon after that?

A. I seen them working that time was all.

Q. You saw them working at that time?

A. Yes, sir.

Q. Did you ever visit the canyon after that time?

A. Yes, sir; I come and fetched a load of Chinamen for Mr. Cole about nine or ten years ago, I should judge it was; I don't know, particularly.

Q. Where did the Chinamen come from?

A. Huntington.

Q. Where did he take them to?

A. To the cabin there on the diggings down on Willow Creek.

Q. Mr. Cole sent them in there?

(Testimony of John Thompson.)

A. Yes, sir.

Q. That, you say, was about ten years ago?

A. Nine or ten, I ain't sure which.

Q. Do you know a gentleman by the name of Mr. Wood? A. Yes, sir.

Q. Was he along with you at that time?

A. He came ahead of me. He had a hack and fetched the boss Chinaman.

Q. He took somebody in, too?

A. He took the boss Chinaman in.

Q. How many did you take in? A. Seven.

Q. Did you go down the canyon in below where the house is at [584—528] that time?

A. No, sir; I did not.

Q. Did you see at that time where they had been mining?

A. Yes, sir; I saw where there had been a lot of work done.

Q. Was that below, or above, or where in reference to the cabin?

A. Well, it was a little bit below the cabin.

Q. Was that below or above or where with reference to the first place where you saw men mining thirty years ago? A. Oh, it is away below.

Q. How many miles below?

A. Well, I ain't right sure; I should judge it was between two or three miles.

Q. Were you ever in the canyon at any other time? A. No, sir.

Q. Do you know what the character of the ground in the canyon has been known as—what its reputa-

(Testimony of John Thompson.)

tion is as to whether or not it was mining property for the last thirty years?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial.

A. No, sir; I never knew anything about it.

Q. Have you ever heard it talked about by people?

A. No, sir; I never talked to anyone about it.

Q. You never talked to anyone about it; then, of course, you would not know its general reputation. What season of the year was it when you were taking these Chinamen in?

A. I guess it must have been March. I ain't right sure, but I know it was in the spring of year, because the snow *as* just going off. [585—529]

Cross-examination by Mr. HUNTINGTON.

Q. Do you know who the men were you saw there the first time you was there?

A. Well, one was Mr. Boswell, and the other was his partner; I don't know who he was.

Q. Do you know how long Mr. Boswell remained there? A. No, sir; I don't.

Q. Were you in the canyon again after that time until you took the Chinamen in? A. No, sir.

Q. And those were the only two times you were ever down there? A. Yes, sir.

Q. Do you know how long the Chinamen stayed there? A. I don't.

Q. And do you know what the arrangement was under which they went in there?

A. No, sir; I don't.

(Testimony of John Thompson.)

Q. What is your business, Mr. Thompson.

A. Teamster.

Q. You live now at Huntington, but you said you formerly lived up the river. You meant Burnt River when you said "the river"?

A. Yes, sir; but I live in Huntington now.

Q. Can you not recall the year when you took the Chinamen in? A. No, sir; I am not right sure.

Q. It may be ten years ago; and may have been nine years ago; and it may have been eight years ago?

A. Yes, sir. I think it is more than eight years. I am not sure; I couldn't tell. [586—530]

Q. Then you think it was somewhere along in March of 1898 or '99?

A. Yes, sir; some place along there; I ain't sure just when it was. I couldn't tell.

Q. Was Mr. Cole there at that time?

A. He was in Huntington running the butcher-shop.

Q. Was Mr. Insenhorfer there at that time?

A. No, I don't think he was.

Redirect Examination by Mr. HART.

Q. Mr. Thompson, at the time you took the Chinamen there, you say that was in the spring of the year? A. Yes, sir.

Q. And you put them out at the cabin?

A. Yes, sir.

Q. Did you see below the cabin where work had been going on, mining?

A. Just a little piece below the cabin just as far as I could see. I just stayed there and eat my dinner

(Testimony of John Thompson.)

and didn't walk around any.

Q. But you saw where work had been carried on?

A. Yes, sir; I saw where work had been carried on.

Q. The previous years?

A. Yes, sir; I don't know how long; some of it had been done a long time.

Witness excused. [587—531]

[Testimony of Robert Wood, for Defendant.]

ROBERT WOOD, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Where do you live, Mr. Wood?

A. I live in Huntington.

Q. How long have you lived in the State of Oregon? A. Thirty-one years.

Q. What part of the State of Oregon have you lived in during that time? A. Baker County.

Q. Do you know the location of the mining property in the gorge of Willow Creek in Malheur County? A. Yes, sir.

Q. I have reference to the property owned at one time by Leonard Cole and others and property in that vicinity in that gorge. A. Yes, sir.

Q. Were you ever in there? A. Yes, sir.

Q. How long have you been acquainted with the property in that place—that locality?

A. About nine years ago was the first time I was there.

Q. You were there nine years ago?

(Testimony of Robert Wood.)

A. Yes, sir.

Q. What business are you engaged in?

A. Now?

Q. Yes, sir. A. I am a contractor. [588—
532]

Q. Have you been engaged in business during the years you have lived in Oregon at Huntington?

A. Yes, sir.

Q. What business have you followed?

A. I have been in the stock business—cattle and horses, hotel business and butcher business.

Q. What was the occasion of your visiting that property you say nine or ten years ago, whenever that was?

A. I brought a Chinaman over there.

Q. Who caused you to take a Chinaman over there? A. Mr. Cole and Mr. Insenhorfer.

Q. What caused them to do so?

A. They had leased the ground and was going to work it.

Q. The Chinamen had? A. Yes, sir.

Q. Who from?

A. Mr. Cole and Mr. Insenhorfer.

Q. Anybody else take Chinamen over there?

A. Mr. Thompson did.

Q. Had you ever been over to that mining property previous to that time? A. No, sir.

Q. After that time, were you ever at the mining claims? A. Yes, sir.

Q. When were you there?

A. Seven years ago this fall. I had a contract

(Testimony of Robert Wood.)

there to fix the ditch.

Q. Who did you have a contract from?

A. From a man by the name of Taylor.

Q. Did he have a lease of it from Cole—the property?
A. I understood so. [589—533]

Mr. HUNTINGTON.—Objected to as not the best evidence and hearsay.

WITNESS.—That is what I understood—he had it leased from them.

Q. What was his name, did he say?

A. Taylor.

Q. Did Mr. Taylor or Mr. Cole say anything to you about the fact that Taylor was working there?

Mr. HUNTINGTON.—Objected to as incompetent, hearsay and not the best evidence.

Q. Did Mr. Cole give you any instructions about the fact that Taylor was working there?

Mr. HUNTINGTON.—Objected to as incompetent, hearsay and not the best evidence.

A. Yes, sir.

Q. Now, that was seven years ago, you say?

A. This fall; yes, sir.

Q. And how long were you working on the ditch?

A. Well, I went in September, I believe, and stayed there until snow drove me out, and I couldn't work any longer.

Q. About how long in months was that?

A. Oh, it would be probably three months.

Q. Have you been in there recently in the last year?
A. No, sir.

Q. When was the next time you were in there?

(Testimony of Robert Wood.)

A. I haven't been there since.

Q. You haven't been in there since then? [590—534]

A. No, sir.

Q. Do you know where that big promonitory or butte is about a mile or a mile and a half below where the cabin was?

A. Yes, sir.

Q. You may state how far down the creek the ditch extended in reference to this butte or promonitory.

A. It goes right below it.

Q. Below the promonitory?

A. I finished the ditch, it lies right below it down below the canyon.

Q. When you first went there with the Chinamen nine years ago, and Mr. Thompson, did you see any mining done there then?

A. Yes, sir.

Q. Where? Did you notice the cabin that stood there at that time?

A. Yes, sir.

Q. About how far above this promonitory or butte was that cabin?

A. Well, I should judge it would be from three-quarters to a mile or more.

Q. Three-quarters of a mile to a mile?

A. Yes, sir.

Q. How long were you there at the time you took the Chinamen there?

A. I stayed there over night.

Q. Where did you observe work being done in the creek at that time with reference to the cabin, whether below or above it?

A. Below it and above it, both.

Q. In reference to the cabin? A. Yes, sir.
[591—535]

(Testimony of Robert Wood.)

Q. How far below the cabin was work being done?

A. Oh, probably a quarter, and maybe not that far.

Q. Now, you went back two or three years afterwards—seven years ago and did the work on the ditch? A. Yes, sir.

Q. When you were there the first time did you observe the ditches?

A. I could see a ditch over on the hillside; yes, sir.

Q. When you were there and worked on the ditch did you observe where the men had been working and mining gold?

A. Yes, sir, and mining then too, running hydraulic.

Q. What were they mining for? A. Gold.

Q. How were they mining and what with?

A. Hydraulic.

Q. They had giants there? A. Yes, sir.

Q. How many giants did they have at work?

A. He had one at work then.

Q. He was working one giant then?

A. Yes, sir.

Q. Where was that giant at work with reference to that butte? Was it below or above or by the butte? A. It was above it.

Q. How far above the butte?

A. Oh, between three-quarters to a mile.

Q. Now, did you observe at that time whether any mining had been carried on and was carried on below the butte?

(Testimony of Robert Wood.)

A. I could see where prospecting had been done, where the holes had been made.

Q. How much mining had been done at these places, could you tell? [592—536]

A. I couldn't tell.

Q. Did you see any rockers? Where it had been mined with rockers?

A. No, sir, I didn't notice them.

Q. Do you know where they mined in the spring and summer where it would often be filled up by the rush of snow water in the winter?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

Q. Did you observe that?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. How far below the butte did you observe this prospecting going on?

A. Probably half a mile below.

Q. Were they mining on both sides or what particular side of the creek, or where?

A. Well, there was a great deal of mining done on both sides of the creek.

Q. Is that true both above and below the dam?

A. Yes, sir.

Q. Below the butte was there evidence of where they had mined on both sides of the creek?

A. Yes, sir.

Q. Did you see any gold taken out there?

A. Yes, sir. [593—537]

(Testimony of Robert Wood.)

Q. How many clean-ups were made while you were there?

A. They cleaned-up once while I was there.

Q. Do you know how much gold was taken out?

A. No, sir; I seen it but I don't know. I don't know whether I seen it all or not but I seen some of it.

Q. But you saw some taken out?

A. Yes, sir.

Q. Do you know what that ground was known as during the years you have spoken of, as to whether it was commonly and generally known as mining ground?

Mr. HUNTINGTON.—Objected to as incompetent immaterial and hearsay.

A. Yes, sir.

Q. Well, was it?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Did that general reputation pertain to both sides of the creek or only one?

Mr. HUNTINGTON.—Objected to as incompetent, immaterial, hearsay and leading.

A. To both.

Q. Did it pertain to the ground both above and below both sides or only on one side?

A. Why, I understood it was both sides.

Q. Now, have you ever been there since that time? [594—538] A. No, sir.

Q. How many men were at work when you were there putting in the ditch?

(Testimony of Robert Wood.)

A. Do you mean for my work?

Q. No, mining if any? A. Two.

Q. How many did you have working on the ditch?

A. Oh, I had sometimes eight, ten and sometimes twelve.

Q. You took that by contract? A. Yes, sir.

Q. And how much was the contract price?

A. I was to receive so much a yard for digging the ditch.

Q. How much did that amount to in the total?

A. I don't know; I never finished the ditch. It never was finished, not altogether.

Q. Was the ditch to extend down farther than where you quit?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Then you quit work because of the falling snow? A. Yes, sir.

Q. Do you know how much farther down the ditch was extended after you left there?

A. I don't know whether it was extended at all or not.

Q. You don't know how much farther it was extended? A. No, sir.

Q. I wish you would tell me as near as your memory goes the full amount that you were to receive for the work that you did do. Of course, I know that a man can't remember back years and give the cents.

[595—539]

Mr. HUNTINGTON.—Objected to as incompe-

(Testimony of Robert Wood.)

tent and leading.

A. \$1.75 for dirt, and \$2.50 for rock work.

Q. About how much did it all come to?

Mr. HUNTINGTON.—Objected to as incompetent.

A. Well, it come to probably \$1,200 or \$1,400.

Q. Now, was the work which you were carrying on, was it done in secret, or public and open, or how?

Mr. HUNTINGTON.—Objected to as leading and calling for the conclusion of the witness.

A. It was public; yes, sir.

Q. Was it open so that anyone could see and know?

Mr. HUNTINGTON.—Objected to as leading and calling for the conclusion of the witness.

A. Why, of course.

Q. Was the men mining there; state whether or not their work was open and public or secret?

Mr. HUNTINGTON.—Objected to as leading and calling for the conclusion of the witness.

A. Why, sure.

Q. Sure what? A. It was open and public.

Q. It was done the same as other mining claims—state whether or not it was done in that manner, open and public? [596—540]

Mr. HUNTINGTON.—Objected to as leading and calling for the conclusion of the witness.

A. Yes, sir.

Q. Was there any objection raised by anybody to the mining work or your work there?

Mr. HUNTINGTON.—Objected to as leading and

(Testimony of Robert Wood.)

calling for the conclusion of the witness.

A. No, sir.

Cross-examination by Mr. HUNTINGTON.

Q. You say you were contracting; that has been your business? A. Yes, sir.

Q. What kind of contracting?

A. Do you mean now?

Q. Yes, sir. A. Take any kind of contract.

Q. Ditch work?

A. Ditch work or anything; take any kind of contract.

Q. You took one Chinaman over, as I understood you?

A. The boss Chinaman rode with me in a hack; yes, sir.

Q. Now, how long did you remain over there?

A. At that time? [597—541]

Q. Yes, sir.

A. I stayed there over night.

Q. You occupied the cabin there, the old Boswell cabin? A. Yes, sir.

Q. Could you give us the year when that was?

A. It was nine years this spring.

Q. That would be 1900.

A. Yes, sir, so far as I can remember.

Q. Now, two years after that was the first time you next went in? A. Yes, sir.

Q. When you went there nine years ago there was no one there when you got there?

A. No, sir. Only the Chinamen we brought.

Q. I mean only those Chinamen?

(Testimony of Robert Wood.)

A. Yes, sir.

Q. Was the cabin locked up or just open and you went right in?

A. I think it was locked and we had the key; that is if I remember right.

Q. And was there anything in the cabin? That is, had it been recently occupied?

A. Yes, sir, stoves and cooking utensils.

Q. There was no provisions or bedding?

A. The Chinamen brought some with them.

Q. You did not find flour and that sort of stuff there? A. I didn't look for anything; no, sir.

Q. And that is the time Mr. John Thompson went with you or followed you? A. Yes, sir.

Q. Do you know how long the Chinamen remained there? [598—542]

A. Why, they worked there that summer all summer until fall.

Q. They were not there when you went back in two years afterwards?

A. No, sir, they wasn't when I went back two years afterwards. They worked that summer.

Q. Were you ever there after taking the Chinamen in until you went to work on the ditch?

A. No, sir.

Q. You don't know when they quit?

A. Yes, sir, I know when they came back to Huntington. The boss lived in one of my houses.

Q. When did they come back?

A. That fall, the same fall.

Q. Now, there was no mining done there from

(Testimony of Robert Wood.)

that time until you went back to work on the ditch was there? A. Well, I don't know.

Q. You don't know of any? A. No, sir.

Q. Now, this ditch: What was the condition of it when you started to work on it?

A. Well, I cleaned out the old ditch in the first place.

Q. Well, what was the old ditch?

A. It had a good deal of dirt come into it and I cleaned it out.

Q. Was your work a continuation of the old ditch?

A. I continued the old ditch and built a new ditch too.

Q. Did you build a new ditch clear from its beginning?

A. At the head there was a small ditch and I enlarged it and when it got down farther there was no ditch and then I built a ditch from there on down.

Q. Did you work on more than one ditch?

A. Yes, sir. [599—543]

Q. Where were they?

A. One on each side of the creek.

Q. How long was the one on the right-hand side of the creek as you go up?

A. Probably a mile and a half.

Q. Is that the ditch that was small and filled up and you had to rebuild it part of the way?

A. Part of it; yes, sir.

Q. Now, take the ditch on the left-hand side of the creek going up, what was its condition?

(Testimony of Robert Wood.)

A. Well, it needed some cleaning out and we cleaned it out. And they run the water in and commenced mining as soon as I cleaned it out.

Q. They run the water in it down as far as the old ditch had been completed? A. Yes, sir.

Q. And then you extended the ditch down farther so that it was opposite that butte?

A. Yes, sir, a little past it.

Q. Well, you were there, do I understand you to say, they were mining while you were digging that ditch?

A. While we was digging on one ditch they was mining on the other.

Q. That was in September—then they do mine in there sometimes in September?

A. Yes, sir, if they have got water they do.

Q. They had water that year, did they?

A. They had some; yes, sir.

Q. Were they working with a giant at that time?

A. Yes, sir.

Q. Who was handling the giant? [600—544]

A. An old gentleman named Solee and a man by the name of John Titus.

Q. How long did they stay there?

A. I left them there when I came away.

Q. After the snow came then? A. Yes, sir.

Q. Were they still mining?

A. Well, they couldn't mine very much, there was a good deal of snow in that creek.

Q. And you only saw them take out a part of one clean-up? A. Yes, sir.

(Testimony of Robert Wood.)

Q. Now, how much gold—could you give us any idea how much gold you saw them take out?

A. I don't know as I saw all they took out; I seen some in a bottle.

Q. What kind of a bottle was it and how full was it?

A. It was a small bottle they showed me with principally nuggets in it.

Q. When you say a small bottle, how small was it?

A. Oh, you have *see* these bottles that have pills in them.

Q. A little round bottle about as big as your little finger?

A. Yes, sir, about twice as big.

Q. And about how long—about two and a half inches?

A. Yes, sir.

Q. And how full?

A. It was about full.

Q. And that was all the gold you saw?

A. That was all the gold I saw; yes, sir.

Q. Do you know how long they had been working there, or were they working when you went in?

A. They was working but not mining. [601—545]

Q. They were not sluicing?

A. They was prospecting and working along the creek here and there until we cleaned the ditch, and then they went to work as long as they got the water.

Q. How high up did they work at any time while you were there above the cabin?

A. Probably a quarter of a mile.

Q. A quarter of a mile?

A. Yes, sir.

Q. Did you see them doing any work above that?

(Testimony of Robert Wood.)

A. No, sir.

Q. And then they worked on down to about opposite the cabin or a little below, as I understood you?

A. They worked in one place while I was there; I don't know what they done after I left.

Q. Was that above or below? A. Above.

Q. When you say the ditch was never finished, you mean it was never finished as far as it was surveyed? A. Surveyed part while I was there.

Q. You said you left before the ditch was finished? A. I did not finish the ditch.

Q. You mean by that you did not finish it as far as they had surveyed it? A. No, sir.

Q. That is what you mean? A. Yes, sir.

Q. Did they use the water in that ditch on the left-hand side of the creek that fall while you were there—the high ditch? A. Yes, sir.

Q. They used the water in that ditch? [602—546] A. Yes, sir.

Q. How far down to the cabin?

A. I run the water clear down below that butte in that ditch myself.

Q. I am asking you how far they brought the water to use it, not how far you brought it? Where did they use the water?

A. In the mines on the left-hand side of the creek as you go up.

Q. As low down as the cabin or above the cabin?

A. Above.

Q. What became of the water? You say you run water in the ditch farther down, was that water

(Testimony of Robert Wood.)

turned back into the creek? A. Yes, sir.

Q. Ran down the side of the hill?

A. Yes, sir.

Q. Did it wash out the side of the hill some?

A. Not very much.

Q. Wouldn't it affect the surface where the water ran down?

A. It would if it ran long enough.

Q. How long did it run?

A. Just to see if it would run there. That was all I cared for.

Q. To see that your ditch was on grade?

A. Yes, sir.

Q. You were asked about the arrangement between Cole and Insenhorfer with the Chinamen. You said the Chinamen leased it. Do you know what the Chinamen paid for the lease? A. No, sir.

Q. You don't know what the terms of the lease were? A. No, sir. [603—547]

Q. Did you ever talk to the Chinamen after they came back from there about the result of their work?

A. Yes, sir.

Q. As a matter of fact, they didn't make it pay?

A. I asked them how they done and they said, "All right."

Q. Did they say they were going back the next season?

A. Well, I didn't ask them that; no, sir.

Q. They didn't come back any more so far as you know? A. No, sir.

Witness excused. [604—548]

[**Testimony of M. D. Kelly, for Defendant.**]

M. D. KELLY, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Where do you live, Mr. Kelly?

A. I live on Willow Creek close to Vale.

Q. How long have you lived on Willow Creek?

A. I have lived there ever since 1877.

Q. What ground—what is the description of your place where you live?

A. It is the southwest quarter of Section 4, Township 16 South, Range 43 East.

Q. And how long have you lived there?

A. On that place? A. Yes, sir.

A. I have lived there ever since 1877.

Q. Are you acquainted with Mr. Leonard Cole?

A. Yes, sir.

Q. Are you acquainted with the gorge—the Willow Creek gorge on beyond Cole's property.

A. Yes, sir, some.

Q. Have you ever been up that gorge?

A. Yes, sir, I have been up there a few times.

Q. Do you know what the reputation—do you remember where that butte stands up there?

A. Yes, sir, I know where the butte is.

Q. Have you been there since the defendant company has been constructing the dam?

A. No, sir, I have not. [605—549]

Mr. HART.—I think it is practically conceded the dam is there at the butte?

(Testimony of M. D. Kelly.)

Mr. HUNTINGTON.—Yes, sir, the prominent butte is one end of the dam.

Q. Are you acquainted with the general character of the ground up that gorge, and as to its general reputation, state whether or not that it is mining ground or contains mineral?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence and hearsay.

A. It has the reputation of being mining ground.

Q. And how long has it been generally and commonly known as mining ground?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence and hearsay.

A. Well, there has been some mining done there, some little mining done there for fifteen or twenty years in that Willow Creek canyon.

Mr. HUNTINGTON.—Move to strike out the answer as not responsive to the question and incompetent.

Q. How long have you generally known, or among people living in that vicinity that that was mining ground or carried mineral or gold there?

A. Well, I have known of a little mining being done there for fifteen or twenty years?

Q. Do you know of the fact of Leonard Cole and Mr. Insenhorfer [606—550] mining there?

A. I understood they were but I never saw them there.

Q. What was generally known about the fact that they were mining in there?

Mr. HUNTINGTON.—Objected to as incompe-

(Testimony of M. D. Kelly.)

tent, not the best evidence and hearsay.

Q. Was it commonly and publicly known that they were carrying on mining operations in there?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence and hearsay and leading.

A. Yes, sir, it was.

Q. How long was that opinion—that common information that they owned the ground and carried on mining operations there?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence, hearsay and leading.

A. Oh, for seven or eight years.

Q. And, so far as you know, they have been doing work in there longer than that?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence, hearsay and leading.

A. Perhaps.

Q. Are you acquainted—or does Willow Creek flow through any portion of your land? [607—551]

A. Yes, sir.

Q. Are you acquainted with the general condition of the creek as it flows through that property in the various seasons of the year? A. Yes, sir.

Q. Are you generally acquainted with the properties owned by the defendant company along the valley of Willow Creek that Willow Creek adjoins?

A. Yes, sir.

Q. Are you acquainted with the influence and effect which the overflow water during the flood season may have upon the lands along Willow Creek valley? A. Yes, sir.

(Testimony of M. D. Kelly.)

Q. You may state whether or not the overflow water in the flooding of the lands is of a beneficial or a detrimental nature to the lands that it overflows. A. I consider it is a detriment.

Q. Do you know persons living in the valley who have taken precautions to prevent the water from overflowing or flooding the lands?

A. Yes, sir; they have some.

Mr. HUNTINGTON.—Move to strike out as leading, incompetent and hearsay.

A. Who do you know of having done that or taken precautions of that nature?

A. Well, Mr. Logan and Mr. Weaver and Mr. Cole and myself.

Q. What was the nature of the construction used by the various parties to prevent their lands from being overflowed?

A. By digging canals or ditches. [608—552]

Q. Did any of them put up any embankments?

A. Yes, sir.

Q. Then by ditches, canals and embankments?

A. Yes, sir.

Q. Do you know Mr. Clagett? A. Yes, sir.

Q. Do you know whether he knew, well, for the last year or more that persons living in the valley have built ditches or constructed embankments so as to prevent flood water from flowing on their land?

Mr. HUNTINGTON.—Objected to as incompetent for any purpose, and if for the purpose of impeachment, no foundation has been laid and therefore it is incompetent and immaterial.

(Testimony of M. D. Kelly.)

A. I don't hardly know whether he has or not, but for the last six or eight months—

Q. Well, say for the last six or eight months?

Mr. HUNTINGTON.—Objected to as incompetent for any purpose, and, if for the purpose of impeachment, no foundation has been laid and therefore it is incompetent and immaterial.

A. Yes, sir.

Q. Do you have any of the company's land leased? A. Yes, sir.

Q. What piece of property is it you have leased?

A. Well, I have got the southeast quarter of Section 5, Township 16 South, Range 43 East. [609—553]

Q. Any other property?

A. And then I have 480 acres leased in Sections 23 and 25; I think that is the numbers.

Q. Now, the company's land you speak of having leased in Section 5, have you done anything to prevent the overflow or flooding of that land by the spring freshets? A. Yes, sir, I have.

Q. What did you do?

A. I built a canal or a ditch.

Q. Did you get permission from the company to build the ditch for that purpose before it was done?

A. I got permission from Mr. Clagett.

Q. What was said to him as to your purpose in wanting the ditch?

A. I told him it was a damage to the land to have that water flooding over it, that it wouldn't raise anything only a little fox-tail, and that it was worth-

(Testimony of M. D. Kelly.)

less, and he gave me permission to build this ditch through parts of his land to drain part of his land and part of mine.

Q. What size ditch did you construct under that permission from Mr. Clagett?

A. It is about 20 feet wide on the bottom and thirty feet on top.

Q. And about how deep?

A. It is about four feet deep.

Q. What effect did the overflow have upon the land which you had leased from the company as well as upon your own land, if any overflowed it, as to whether or not it was beneficial or detrimental?

A. It was a detriment.

Q. What can you say as to the fall of rain or snow during the [610—554] rainy season of the year in the valley: Do you have a fall of that?

A. Yes, sir, we have a fall of snow and some rain.

Q. What effect does it have on the soil or ground upon which it falls as to whether or not it saturates the soil? A. It saturates the soil.

Q. This piece of property you say you had was usually overflowed until you built this ditch?

A. Parts of it.

Q. Now, in 1908 was it overflowed in that season?

A. No, sir.

Q. What can you say as to the character and quality of the crop raised on it in 1908 when it was not overflowed as compared with the years when it was overflowed?

(Testimony of M. D. Kelly.)

A. Well, in 1908 I raised the best crop off of it I ever got.

Q. What effect will overflow of water, where it comes annually and regularly, what effect would it have on the growth of sagebrush and greasewood?

A. Well, if the water runs onto it and stands on it it kills it.

Q. If the water runs onto it and stands on it it kills it? A. Yes, sir.

Q. Where you see a growth of sagebrush and of greasewood on land then is that land subject to an annual overflow where water would stand for a period of time? A. No, sir, I don't think it is.

Q. Where salt grass grows what is the character of that soil? A. It is greasewood land—

Q. No, of the soil; is it alkali soil?

A. It is alkali; yes, sir, and greasewood grows on it; it is supposed to be greasewood land. [611—555]

Q. Now, I will ask you what is the condition, speaking generally, of the properties owned by the complainant company? Do you know where they are located up and down the valley as a general thing?

A. Yes, sir, I know where a good deal of the land is.

Q. What is the condition of the property owned by the complainant company, taking the property clear up to the banks of the creek? What is the condition of it in a general way as to whether or not it raises or has on it growing sagebrush and greasewood?

A. Parts of it has sagebrush and greasewood.

(Testimony of M. D. Kelly.)

Q. State whether or not the greater portion of the ground has that upon it.

Mr. HUNTINGTON.—Objected to as leading.

Q. Speaking in a general way?

A. Why, I don't hardly know.

Q. Then, I will call your attention to the map.

Mr. HUNTINGTON.—Let him finish his answer.

Mr. HART.—I will withdraw that question then.

Mr. HUNTINGTON.—He said: "I don't hardly know."

Q. Now, I will call your attention to—just look at the map and follow it along. I call your attention to Section 31, Township 15 South, Range 43 East. Have you found that?

A. Yes, sir, the greater part of that is in sagebrush.

Q. Do you know how high the banks of the creek along through that section are above the bed of the creek—the top of the banks?

A. The greater part of that I think is—the greater part of that is 20 feet high over part of it.

[612—556]

Q. Does the water ever overflow the land through that section? A. No, sir, it does not.

Q. Now, I will call your attention to Section 5, Township 16 South, Range 43 East.

A. The quarter I have got leased there is just about 100 acres in meadow.

Q. How much of that 100 acres was subject to overflow from Willow Creek?

A. 15 or 20 acres.

(Testimony of M. D. Kelly.)

Q. Did any portion of your land receive water, of the land which you had leased, receive water from any creek other than Willow Creek?

A. No, sir, not unless it would be on one edge of it.

Q. If any portion of that land received water from any creek other than Willow Creek where did it come from?

A. Well, that would be between—that would be on the south side of Section 5. It would come from Gum Creek.

Q. Now, I will call your attention to Section 9, Township 16 South, Range 43 East. Is there any portion of that that is usually overflowed?

A. Yes, sir, there is three or four acres of it.

Q. I will call your attention to Section 23, particularly the south half and the south half of the north half and the northwest fourth of the northwest fourth, I believe that is the property owned by this company, is there any portion of it that is overflowed usually?

A. Well, there is some parts of it that is overflowed at times of extreme high water.

Q. Extreme high water? A. Yes, sir.

Q. That would not come along except in how many years, say? [613—557]

A. Oh, perhaps once in four or five years, or three or four years.

Q. Would that occur sufficiently often so that a farmer could calculate upon the overflow to produce crops agriculturally, even if the overflow were of

(Testimony of M. D. Kelly.)

benefit, would it occur sufficiently often?

A. To produce a crop every year?

Q. Yes, sir, so you could calculate upon it.

A. I don't think it would.

Q. What is there growing upon that section of land in 23?

A. Some salt grass, and rye grass, and greasewood and sagebrush.

Q. Is there sagebrush growing on Section 9?

A. Yes, sir.

Q. I will call your attention to Section 25, Township 16 South, Range 43 East: What can you say as to the amount of that, if any, that is usually overflowed?

A. Well, I would judge there would be ten acres.

Q. What do you say as to Section 31, Township 16 South, Range 44 East, the west half and the southeast one-fourth, as to whether any of it is usually overflowed?

A. There might be a little of it overflow. I can't say.

Q. You don't remember as to that?

A. No, sir.

Q. Now, I will call your attention, look at that portion of the map, to the land in Section 27 that is up in the gorge, and in Section 3 still in the canyon before it gets down to Cole's place. Can you state how high the banks of the creek along at those places are—what the height of the banks are?

A. Through Cole's place?

Q. Yes, sir, through those sections I called your

(Testimony of M. D. Kelly.)

attention to. [614—558]

A. Why, I think the banks will run from five to eight feet high.

Q. You are looking at the wrong place. This is up in the canyon above Cole's place. The sides of the canyon up there—this is up in the canyon Section 27; Cole's is away down here. Section 3 is still in the canyon as you go up. Do you remember the banks how high they are there—how they look?

A. In Section 3?

Q. Yes, sir.

A. Yes, sir, the hills are pretty high there.

Q. That would be Section 3, Township 15 South, Range 42 East? A. Yes, sir.

Q. Do you recall whether or not it is simply a hilly mountain-side?

Mr. HUNTINGTON.—Objected to as leading.

Q. State as to the character of the ground, as to whether or not it is a hilly, rocky mountain-side?

A. Yes, sir, it is hilly on each side of the creek.

Q. What is the value, if any, of the land in those sections? A. In Section 3?

Q. Yes, sir; Section 3, Township 15 South, Range 42 East, and Section 27, Township 14 South, Range 42 East.

A. Well, I would not think they were worth more than \$1.25 an acre.

Q. Now, what is the value of the land that is on the benches and above where any of the water ever overflows it? Any of the land owned by the company along through the valley? What is the value

(Testimony of M. D. Kelly.)

of such land—the banch land above the line where it is ever flooded—overflowed? [615—559]

A. Above the line where it is ever overflowed?

Q. Yes, sir, what is it worth?

Z. Well, it is not worth more than \$1.25 an acre in my judgment.

Q. Now, what is the value of the overflowed land which may be owned by the company in Sections 5, 9, 23, 25, 16 and 43, Township 16 South, Range 43 East, whatever portion of the land which they own, which may be overflowed from Willow Creek—what is its value per acre—that is, the portion which is overflowed?

A. It is probably worth \$10.00 an acre.

Q. Is that same estimate true of their land which they own which may be usually overflowed in the valley, the same figure?

A. The land that is usually overflowed?

Q. Yes, sir, which they may own from Willow Creek? A. Yes, sir, I think about that.

Q. And the other land in the valley which they own you say is worth about a dollar or a dollar and a quarter an acre that is not overflowed, and excepting the pasture lands which you speak of having?

A. I don't quite understand.

Q. Well, the other sagebrush land you say is worth about \$1.25 an acre?

A. It is worth about \$1.25 an acre.

Q. Are you familiar with—have you been up the canyon since the defendant company has been building the reservoir up there?

(Testimony of M. D. Kelly.)

A. No, sir, I have not.

Q. Do you recall that butte or promontory up there in the canyon? [616—560] A. Yes, sir.

Q. We will assume that a reservoir is put near that butte or promontory, do you know the names of the creeks on the right-hand side of the valley going up which flow into Willow Creek below that butte or promontory is—on the east side of Willow Creek?

A. Yes, sir, I know the creek.

Q. Do you recall the short ones?

A. Baker Creek, Fips Creek (heretofore called Fox Creek in transcript), Stone Quarry Gulch and Dry Gulch.

Q. Do you recall the names of the creeks which flow into Willow Creek on the west or left-hand side of the valley as you go north, and which flow into it below the place of that promontory or butte and excluding therefrom Pole Creek?

A. Yes, sir, Black's Creek, Gum Creek, Dry Creek, Sheep Corral Creek, Turner Gulch, Little Willow Creek and Current Creek?

Q. The waters of these various creeks eventually reach and flow into what central creek or channel?

A. Willow Creek.

Q. Do you know whether any of them run either their whole course or part of their course throughout the year above ground?

A. Just part of the course?

Q. Either their whole course or a part of their course? A. Yes, sir.

Q. Well, are they running the full year continu-

(Testimony of M. D. Kelly.)

ous stream running in the course above ground continuously throughout the year, some of them?

A. One or two of the creeks that is flowing a little water.

Q. The water that runs then throughout the year, where does the water go to?

A. It sinks in the bed of the creek. [617—561]

Q. And finally reaches where to?

A. I don't know where it goes to.

Q. You don't know? A. No, sir.

Q. The bed of Willow Creek is lower than the beds of any of those other creeks?

Mr. HUNTINGTON.—Objected to as leading.

Q. Is it or isn't it?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir, it is.

Q. What can you say as to the volume of water coming down either or any of these creeks during the rainy season or spring freshet season?

A. There is lots of water comes down there through the freshet season.

Q. How high have you seen the water coming down these creeks or either of them during the freshet season?

A. Oh, I have seen some of them full and running over the banks.

Q. Well, about how high would that be—how deep would the water be?

A. Well, Fips Creek would be eight or ten feet deep.

(Testimony of M. D. Kelly.)

Q. And about how wide would that be—Fips Creek?

A. Well, it would be all the way from 20 to 100 feet wide.

Q. Have you seen a similar condition in any of the other creeks that you have mentioned on either side of the valley? A. Yes, sir. [618—562]

Q. You may state whether or not it ever occurs that there is more water flowing into Willow Creek from these creeks than the amount of water coming down through the gorge.

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir; I would say that there was.

Q. What season of the year is it that the spring freshets usually occurs?

A. Well, during the month of February or March.

Q. What is the condition of the ground as a general thing at that season of the year?

A. Generally the ground is frozen.

Q. If the ground is frozen does the water, even if it overflows, sink into the soil or not?

A. No, sir, it runs off.

Q. How often, about, is the flood waters sufficient in size so as to overflow the banks of the creek?

A. It overflows some parts of the creek channel most every year.

Q. Some parts of it?

A. Excepting these two last years, 1908 and 1909. [619—563]

(Testimony of M. D. Kelly.)

Cross-examination by Mr. HUNTINGTON.

Q. You say some parts of the valley are overflowed almost every year. That was true to a considerable extent prior to 1908, wasn't it?

A. Yes, sir, it is overflowed.

Q. There is considerable of the lowland in the valley so overflowed? A. Yes, sir.

Q. And eliminating the land which is so low that the water would flow back into the creek again, not considering that kind of land, the water would overflow these lowlands and stand upon it long enough to thoroughly saturate them so that when the water receded as the creek went down, after the water had flowed off of them it benefited them to the extent that a crop of hay would be raised on them?

A. I don't think it benefited them any.

Q. You don't think it benefited any of them?

A. Not those low ones.

Q. I am talking about those not so low but what the water can flow back again into the creek and drain into the creek: Do you mean to say there is not a benefit to that kind of land?

A. If the water was there a day or two it would be all right.

Q. If the water was there a week or two or three weeks and then flowed off you don't think it would be a benefit to that kind of land?

A. No, sir, I think it would damage it more than it would do good—that lowland. [620—564]

Q. These small creeks you have told about that flow into the creek, is it true that they usually flow

(Testimony of M. D. Kelly.)

off before the main creek rises or usually comes up?

A. Usually about the same time.

Q. Isn't it true that the headwaters of the main channel of Willow Creek are much higher than—in elevation—than the headwaters of these side creeks which run from these ridges on each side of the creek?

A. Yes, sir.

Q. And the headwaters of Willow Creek are in the elevations covered with timber?

A. Yes, sir.

Q. And isn't it true that the snow does not melt as quickly there as it does down here on these side-hills of the valley?

A. It doesn't melt as much, no, as it does on the lower hills.

Q. So that the snow would melt and run off here quickly while it would take some time for it to melt and flow off up there?

A. Yes, sir, it would take longer.

Q. Now, isn't it true, just as I stated a moment ago, that these small creeks discharge their water and the flow of the water from them usually commences sooner and is over sooner than the flow of water from the upper valley—or upper head waters?

A. Well, it will all start about the same time.

Q. And still you think that while that is much higher and in a timbered country this will last as long as it does?

A. There is lots of it goes at the same time, or the country would be spotted.

Q. How long does it usually take these small

(Testimony of M. D. Kelly.)

creeks to run out?

A. Oh, the rush may be on for four or five days or a week.

Q. Anywhere from two to five days to a week?
[621—565] A. Yes, sir.

Q. But the flood water that overflows the valley and sometimes stands upon the lowlands in the valley for two or three weeks, doesn't it?

A. It does in places.

Q. When you said you had seen more water coming down from these side creeks than comes from the main channel do you mean to say that, take it during the period from the first of January say until the first of June that more water comes down these side canyons and sidehills and small creeks than the main channel, take it altogether?

A. Yes, sir, I do.

Q. You think more water and more precipitation on these sidehills covering an area from the canyon, which is, say, 28 or 29 miles from here—down to Vale—more water comes from that watershed on each side than from all the other watershed from the upper creek? A. Yes, sir.

Q. More moisture must fall then on this side of the valley than falls in the mountains, do you think that? A. Well, I think there is more water—

Q. Now, just answer the questions one at a time. Do you think there is more precipitation on the sides of these lower hills from the canyon above Cole's down to where Willow Creek empties into Malheur River than there is in the watershed above the can-

(Testimony of M. D. Kelly.)

you near Cole's? A. Yes, sir, I do.

Q. A greater precipitation of snow?

A. Yes, sir.

Q. And you are willing to stand on that proposition, are you? A. Yes, sir. [622—566]

Q. You have lived up there on Willow Creek, how long? A. Ever since November, 1877.

Q. You own the southwest quarter of Section 4, Township 16 South, Range 43 East?

A. Yes, sir.

Q. Willow Creek runs through that?

A. Yes, sir.

Q. When did you get your title to that from the Government? A. About 1896.

Q. And you leased from the complainant company the southeast quarter of Section 5?

A. Yes, sir.

Q. And Willow Creek flows through that?

A. Yes, sir.

Q. Now, you say that that land is so low that its being deprived of the overflow water from the creek is a benefit, as I understood you, on your direct examination? A. Yes, sir, I say it is.

Q. How is that land situated with respect to your land in Section 4? Is it lower?

A. Yes, sir, there is some of it—No, it is about the same along the creek; it is about the same.

Q. It is about the same? A. Yes, sir.

Q. But you irrigate your land, don't you?

A. No, sir.

Q. Don't you irrigate any of your land?

(Testimony of M. D. Kelly.)

A. Not that part the creek runs through.

Q. Do you irrigate any of your land?

A. Yes, sir.

Q. How much? [623—567]

A. Probably 80 acres.

Q. Is that 80 acres of land contiguous to your lowland?

A. Yes, sir, it joins onto the lowland.

Q. That 80 acres joins onto the lowland?

A. Yes, sir.

Q. The water used in irrigating in so far as it seeps down through the ground would seep down onto this lowland?

A. It would some; yes, sir.

Q. Now, the channel of Willow Creek through your place is very much choked—the old channel—isn't it?

A. Yes, sir, there is not very much of a channel there.

Q. And that set the water back so as to keep the water on your lowland a long time in the spring and late in the summer?

A. It does of years when the water is high.

Q. You say that last year you had a better crop than usual? A. Yes, sir.

Q. How was it this year?

A. This year it was good.

Q. Was it better than last year?

A. No, sir.

Q. It wasn't so good?

A. It wasn't quite so good.

(Testimony of M. D. Kelly.)

Q. Suppose next year you have no overflow water on that land at all what will be the result?

A. I think it would raise a good crop of hay.

Q. You think it would raise a good crop of hay without irrigation at all? A. I do.

Q. If that thing continues right along you think it would always be better?

A. I think it would always be good. [624—568]

Q. Then, why didn't you dig a drainage ditch between this irrigated land and your lowland and protect it from that water?

Mr. HART.—Objected to as incompetent.

A. There is a drainage ditch between my lowland and my highland.

Q. The one you just spoke about in your direct examination? A. I have another ditch.

Q. Do you never run any water in that ditch to irrigate with? A. No, sir, I never have.

Q. Do you ever get any water out of it?

A. I never have got any water out of it.

Q. Is that the Grimes ditch, that lower ditch?

A. Yes, sir.

Q. That carries water?

A. That carries water, yes, sir.

Q. So that you get whatever seepage there may be from that ditch onto your lower land?

A. Yes, sir, I get some seepage.

Q. Now, you told Mr. Clagett, didn't you, at the time you applied to him for the right to dig this so-called drainage canal, that you wanted to build that canal because the main channel of Willow Creek

(Testimony of M. D. Kelly.)

was blocked up there and the water did not run off your land as it should and you wanted to build around that blocked place in the creek?

A. I told him I wanted a right of way in there to build a canal between my place and also his.

Q. And you told him that the reason you wanted that was because of the blocking up of the channel of Willow Creek? [625—569]

A. I told him it was blocked up some.

Q. And that drainage canal heads in the creek so that all the water which comes down the old channel of Willow Creek to your land will hereafter flow through this canal you have dug? Isn't that true?

A. All the water that comes down Willow Creek?

Q. All the water that flows there?

A. I think it will.

Q. In other words you have made a new channel for Willow Creek there in effect? A. Yes, sir.

Q. Now, Mr. Kelly, you made an affidavit in this case didn't you?

A. I made an affidavit last fall.

Q. And in that affidavit you expressed a view with respect to the effect upon these overflowed lands directly contrary to what you are now testifying to, didn't you?

Mr. HART.—Objected to as not proper cross-examination.

A. No, sir, I did not.

Q. I wish you would look over the affidavit of which this is a copy and say whether or not that is the affidavit or a copy of the affidavit, which you

(Testimony of M. D. Kelly.)

subscribed your name to and swore to? (Counsel hands witness papers.)

A. This affidavit? I did not read this affidavit when I made my statement.

Q. But wasn't it read over to you before you signed it? A. I don't recollect of it being read.

Q. Will you say it wasn't read to you, Mr. Kelly?

A. I don't recollect of it.

Q. You don't recollect of it being read to you? [626—570] A. No, sir.

Q. And didn't I read that over to you and then ask you to hold up your hand and swear to it?

A. I don't recollect of it.

Q. Will you swear you did not make that affidavit as contained in that paper?

A. I will swear that I did not make my statements in that way.

Q. You will swear that you did not make your statements in that way, do you?

A. Yes, sir. I would not have got permission from Mr. Clagett to dig that canal to make that drainage ditch and swear to that.

Q. Do you remember of my being at your house in the month of November, 1908?

A. Yes, sir.

Q. And do you remember that was the only time I was at your house? A. Yes, sir.

Q. And do you remember of my sitting down and talking this matter over with you?

A. Yes, sir.

Q. And your stating to me what you were willing

(Testimony of M. D. Kelly.)

to swear to? A. Yes, sir, I recollect that.

Q. Will you swear, Mr. Kelly, that you did not say to me at that time that—and in that conversation, that the main body of land in Willow Creek Valley through which Willow Creek flows is flat and quite level and during the spring and winter months the creek where it is confined to its natural channel is a very small stream and overflows riparian lands and the waters in ordinary years inundates such riparian [627—571] lands from February to about May 1st? Did you not state that to me in that conversation or words to that effect?

A. No, sir, I do not recollect of making a statement of that kind.

Q. Will you swear you did not make that statement? A. I don't think I did.

Q. Did you not also in that same conversation at that same time say to me that such inundation soaks and saturates such lands so thoroughly that they are capable of producing and do produce profitable crops of alfalfa or wild hay? A. The lowland?

Q. Yes, sir, on the lowlands. Did you not state that?

A. No, sir, the alfalfa will not live where it is overflowed.

Q. Did you not state to me in that conversation that such inundation results in a subirrigation which keeps hay growing until maturity of one crop?

A. It might subirrigate from the creek, but where it runs over the alfalfa it will kill it.

Q. Did you not say to me, Mr. Kelly, in that con-

(Testimony of M. D. Kelly.)

versation that such inundation results in a subirrigation which keeps the hay growing until maturity of one crop or words to that effect? Now, say "Yes" or "No," whether or not you made that statement to me.

A. I don't think I did.

Q. Did you not also say to me in that conversation that such are the conditions when there is the usual fall of moisture and snow about the head of said creek or words to that effect?

A. Please read that again.

Q. (Previous question read to witness.) That such are the conditions during ordinary years when there is a usual fall [628—572] of moisture and snow about the head of said creek, that ordinarily follow the matter of the inundation?

A. I don't recollect—

Q. Did you or didn't you say to me in that conversation at that time that during the season of 1908 there was no overflow in the valley of said creek owing to an unprecedented lack of snow and misture, and, as a result, the lands which afe ordinarily irrigated by inundation and depend upon such inundation alone for irrigation, produced a very small crop? Did you use that language?

A. I surely did not.

Q. And, in that conversation, didn't you call my attention particularly to the condition in the valley below your place to the men who had in other years cut wild grass from these overflowed lands, and that that year, 1908, they did not cut any crop or a very little crop, or words to that effect?

(Testimony of M. D. Kelly.)

A. I might have done that.

Q. And didn't you say that the reason was that there was no overflow on their lands during that year?

A. I might have.

Q. And didn't you say, also, in that conversation, that when there was an overflow of those lands as was usual in the spring of the year that such lands would produce one crop of wild hay sufficient to make it profitable to cut it?

A. I might have said that with the overflow and the rain and the snow that fell on the ground.

Q. And didn't you say that without such overflow they would not raise a crop—that such lands wouldn't raise a crop?

A. With the snow and rain; I don't know as I said overflow.

Q. Will you say you didn't say when there was no overflow that [629—573] these lands would not raise a crop? Now, didn't you say that to me, either in those words or words to that effect?

Mr. HART.—Objected to as incompetent as I don't believe counsel has the right to browbeat a witness, and the witness has answered the question and said the land might not produce a crop and overflow, and he might have said something of that character.

A. I don't know whether I did or not.

Q. Didn't I ask you in that conversation, Mr. Kelly, as to what these overflowed lands were worth, if they received the annual overflow, and didn't you state in that conversation at that time to me in

(Testimony of M. D. Kelly.)

answer to that question that you thought such lands would be worth \$30.00 an acre? Didn't you so state?

A. If they were overflowed?

Q. Yes, sir. A. I don't recollect.

Q. And didn't you state to me in that conversation that if such lands were deprived of the overflow that the value of the land would not exceed \$10.00 an acre?

A. I don't believe I did, Mr. Huntington.

Q. You don't think you did? And, in that same conversation didn't you say to me that the lands without overflow would be useful only for pasturage?

A. Unless they were overflowed?

Q. Yes, sir, unless they were overflowed they would be only useful for pasturage.

A. I don't recollect of saying that.

Q. In that same conversation didn't you say to me in substance [630—574] that the annual overflow of the valley has been usual and ordinary flow of water in the valley every year that you had been there with the possible exception of two or three years? Did you or didn't you?

A. I don't recollect of telling you that.

Q. Now, let me refresh your memory a little further, Mr. Kelly. Do you not remember that when that affidavit was prepared I first read the affidavit and read it over to you, and you criticized the wording of some parts of the affidavit and I drew my pen through the part which you thought were not correctly stated, and didn't I then ask Mr. Clagett, who was present during that conversation, or at least a

(Testimony of M. D. Kelly.)

part of it, to copy or rewrite that portion of the affidavit which you did not ask to have changed while I was writing the affidavit of Mr. John Taylor? Now, didn't that take place?

A. Possibly it might have. I don't recollect.

Q. And when Mr. Clagett had finished rewriting the first affidavit I had prepared, eliminating the parts I had crossed out or changed by interlineation, I read the affidavit as then prepared and asked you whether or not that was right, and at that time you said to me: "Well, I have got a piece of lowland here that has been actually benefitted by not having water upon it." And, I said to you, then: "Yes, sir, but that is because it doesn't have sufficient drainage," and you said: "Yes, sir, that was the reason." Now, didn't that take place in that conversation?

A. Well, it might have; yes, sir.

Q. Don't you remember that it did, Mr. Kelly?

A. I don't recollect about that, but I recollect about talking about the overflow and wetting the ground. [631—575]

Q. Yes, sir, and after Mr. Clagett had rewritten that affidavit it was either read to you or handed to you and you yourself read it and then signed it and I swore you to it. Did not that take place?

A. I don't recollect of having read it.

Q. Then did I not read it to you?

A. I don't know whether you did or not; I don't recollect about it.

Q. You don't recollect about it?

A. No, sir, I don't.

(Testimony of M. D. Kelly.)

Q. Your attitude as to this case has changed very materially since that time, hasn't it?

A. No, sir, I don't think it has.

Q. Now, Mr. Kelly, since that time you have become a joint owner with this defendant company in the company ditch by virtue of its purchase of two ranches which owned an interest in that ditch prior to that time? A. Yes, sir.

Q. You remember of Mr. Clagett being there in the room when we were talking about this matter, don't you? A. Yes, sir, he was there.

Q. Yes, sir. I will ask you further whether or not in that conversation I did not read to you the affidavit of Mr. C. M. Grimes that had been prepared prior to that time and also the affidavit of Mr. W. J. Scott? A. No, I don't recollect about that.

Q. You don't recollect about that?

A. No, I don't.

Q. Counsel has said—has asked you about the effect of the fall of rain and snow in the valley and you say that the ordinary fall of rain and snow saturates the ground. Do you [632—576] mean by that that it will saturate the ground from the surface to the gravel bed by the ordinary amount of fall of moisture that you get here in the valley?

A. Well, I don't know how far it is down to the gravel but the ordinary fall of water will saturate the ground.

Q. The surface of the ground. But isn't it true that when the surface of the ground is wet and even muddy that you can dig down eight or ten

(Testimony of M. D. Kelly.)

inches and find dust in this soil along the valley?

A. You can't when the snow lays on all winter and goes off.

Q. But after a rainstorm?

A. Yes, sir, you can sometimes.

Q. And it would be even muddy on the surface and yet be dry underneath?

A. Yes, sir, it would be slippery.

Q. Muddy enough to soften the soil to make it bad teaming and yet down a short distance the soil would be dry? A. It happens at times.

Q. Have you ever undertaken to survey any of these overflowed tracts of lands, or do you just simply make a guess as to the amount on these several tracts? A. It is just a guess.

Q. As I understood you you said you thought the value of that land up above the mouth of the canyon would be perhaps \$1.25 an acre?

A. Well, in Section 3—

Q. Eleven and twenty-seven? A. Yes, sir.

Q. Now you say that the bench lands along the valley are worth not to exceed \$1.25 an acre, do you?

A. I don't consider they are. [633—577]

Q. You don't consider that the bench lands along the valley are worth any more than you do the steep sidehills up there above the Cole place, not a cent more? A. No, sir, I don't.

Q. Not even taking into consideration the possibilities of the present as well as the future?

A. Well, the way it looks I don't believe I would.

Q. If you had a section of bench land down here

(Testimony of M. D. Kelly.)

in the valley such as is found pretty nearly all the way up from here to Cole's land that is level or nearly so, free from rocks or nearly so, you would think it was worth no more than a section of land up there in those steep hills?

A. No, at the present time I would not.

Q. When the freshets or when the flood water comes down the valley in the spring you say that the land is usually frozen?

A. Yes, sir, when the freshets come.

Q. And the freshets come generally along in February and March, don't they? A. Yes, sir.

Q. Don't you know, Mr. Kelly, the men who irrigate along the valley here begin to irrigate even in February and March and just as soon as that flood water begins to come down? A. Some do.

Q. Do they irrigate when the land is frozen?

A. They do.

Q. You swear to that, do you?

A. Yes, sir, I do. [634—578]

Redirect Examination by Mr. HART.

Q. In that system of irrigation they stand the water upon the land for a long period of time?

Mr. HUNTINGTON.—Objected to as leading.

A. Well, they run it over the meadow-lands.

Q. Now, counsel asked you if, after a rain, if you could not go down six inches and find dust. Does that occur where there is a hard pelting rain that does not have time to sink in and leave the ground not thoroughly saturated—

(Testimony of M. D. Kelly.)

Mr. HUNTINGTON.—Objected to as leading.

A. At times.

A. Well, it will at times.

Q. But where there is the rain by the day, where it rains by the days or by hours in a more gentle manner, or where snow lays upon the ground and melts then I will ask you if that saturates the soil?

A. Yes, sir, it does.

Q. And goes down in the soil? A. Yes, sir.

Q. The fact that at the present time you own an interest in a ditch in which this company has purchased some land and also owns an interest, that would not affect your evidence in any way, would it?

[635—579]

Mr. HUNTINGTON.—Objected to as leading.

A. No, sir.

Q. Or the truth of your statements? This affidavit about which counsel has been enquiring, you wish to state, as I understand you, if those statements are in the affidavit you did not read it or it was not read to you and that is not what you stated?

A. Portions of it.

Q. These portions you deny? A. Yes, sir.

Q. And if Mr. Clagett copied the affidavit which Mr. Huntington may have written there are things in the affidavit, if that is a true copy of it, different from what you stated? A. Yes, sir.

Q. Mr. Huntington knows—or, rather excuse me, Mr. Clagett knows a field of alfalfa won't grow on land that is overflowed and every farmer knows that, don't they?

(Testimony of M. D. Kelly.)

A. They had ought to know it—I know it.

Q. That is current country knowledge?

A. I think so.

Q. And, if Mr. Clagett wrote into the affidavit which was copied, or if it was written in that affidavit which you signed that alfalfa would grow on overflowed land, it is stating something which is not true? A. Yes, sir.

Q. And if you had known that was in the affidavit you would not have signed it?

A. No, sir.

Q. And what you have stated here is true or isn't true—what you have stated here is true irrespective of what may or may not [636—580] be in that affidavit? A. Yes, sir, it is.

Q. Would you have signed an affidavit saying alfalfa would grow over an irrigated field if you had known it? A. Do you mean flooded field?

Q. Yes, sir, a flooded field; would you have signed it? A. No, sir, I don't think I would.

Q. It would not have been the truth, would it?

A. No, sir, not on the bottom land.

Q. Did Mr. Clagett, at the time he was at your place with Mr. Huntington, know that you had constructed this drainage canal or new channel of the creek for the purpose of keeping flood water off your land? A. He knew I was working on it.

Q. Were you working on it at that time?

A. Yes, sir.

Q. And he knew that was for the purpose of keeping the flood water off of it? A. Yes, sir.

(Testimony of M. D. Kelly.)

Q. And that being true would you have signed such affidavit stating that flood water would be a benefit to the land and to your land?

A. No, sir, I don't think I would.

Q. If the land that is flooded is benefitted by the flood water would you then have constructed a canal to keep the flood water off?

A. No, sir, I would not.

Q. In keeping the flood water off then did you raise or lower the value of the land?

A. I raised it, in my estimation.

Q. At the time you signed the affidavit was there any statement [637—581] made to Mr. Clagett to the effect that the crop of hay which you had raised on this land in 1908, and which had not been flooded, was the best crop that you had raised in years?

A. Yes, sir.

Q. Irrespective of him knowing that fact a contrary statement was put in the affidavit?

A. Yes, sir.

Q. Had you known such a statement was in the affidavit would you have signed it?

A. No, sir, I would not.

Q. Did you notice another portion of this affidavit? It says, "The main body of land in Willow Creek valley through which the creek flows is flat and quite level, and during the spring and late winter months the creek, which is, where confined to its natural channel, a small stream overflows such riparian lands." Now, how much land is there in that Willow Creek valley, just generally expressed

(Testimony of M. D. Kelly.)

in thousands of acres, through which the creek flows—the lands intersected by the creek? Approximately; I don't mean for you to be accurate, I know one couldn't.

A. From the head to the mouth of the creek?

A. From Mr. Cole's place on down?

A. Oh, it runs through a good many sections of land.

Q. Would it be through several thousand acres of land? A section would be 640 acres and ten sections would be 6,400; would it be through several sections of land? A. Yes, sir, I think so.

Q. Now, if the main body of land through which Willow Creek flows, and is flat and quite level, and during the spring and late winter months the creek overflows such riparian [638—582] lands, the inference drawn from such a statement would be that the creek annually overflows thousands of acres of riparian lands, wouldn't it?

Mr. HUNTINGTON.—Objected to as leading.

Q. Would that be the inference to be drawn from that statement, "That the creek annually overflows thousands of acres of riparian lands"?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir, I think so.

Q. Mr. Clagett knew at that time he drew this affidavit that the creek did not annually overflow thousands of acres of riparian lands?

A. He certainly did.

Q. And if the statement of that kind was in the affidavit you did not understand that it was there,

(Testimony of M. D. Kelly.)

that you were being made to swear it overflowed thousands of acres of riparian lands? You would not have signed such a statement?

A. No, sir. I would not.

Q. I will ask you to state when is the first time you ever knew that these statements here alleged to have been contained in an affidavit signed by you?

A. Yes, sir.

Q. How did that occur, that you learned it?

A. I read a copy that—

Q. That I showed to you?

A. That you showed to me; yes, sir.

Q. That is the first knowledge that any such statements were [639—583] ever in an affidavit you had made? A. Yes, sir, it was.

Recross-examination by Mr. HUNTINGTON.

Q. When land is frozen water runs off of it, as I understand you to say?

A. Yes, sir, it does on sloping land.

Q. If there is any inclination of the land at all of course the water would run off? A. Yes, sir.

Q. Then what is the use of irrigating when the land is frozen?

A. Well, I don't think there is much use of it.

Q. How much hay did you get from this land that you have leased of the company this year?

A. I have got about 90 ton altogether.

Q. How much did you get last year?

A. I got 100 ton.

Q. How much did you get the year before?

A. I got 130 I think.

(Testimony of M. D. Kelly.)

Q. How much did you cut the year before that?

A. Oh, along about 140 ton—130 or 40 or 50; I don't recollect, that was four years ago.

Witness excused. [640—584]

At the hour of 5:40 o'clock P. M., July 26th, 1909, adjourned until 7:30 o'clock P. M. to-night.

At the hour of 7:30 o'clock P. M., July 26th, 1909, met pursuant to adjournment as above. Present: Same as before.

[Testimony of John W. Insenhofer, for Defendant.]

JOHN W. INSENHOFER, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Where do you live, Mr. Insenhofer? And what is your business?

A. My business at the present time? I am City Recorder of Huntington.

Q. What age man are you?

A. I am 73 years old.

Q. Are you acquainted with Mr. Leonard Cole?

A. I think so.

Q. How many years have you known him?

A. I guess I have known Mr. Cole for 22 or 23 years.

Q. Have you ever been associated in business with him? A. I have.

Q. In what business?

A. I have been associated with him in the butcher business and I have been associated with him in the mining business.

(Testimony of John W. Insenhofer.)

Q. Do you know the location of the mining claims up in the gorge in the Willow Creek gorge beyond Emory Cole's ranch? A. I do.

Q. Were you ever the owner of any claims in there?

A. I have been and I am now. [641—585]

Q. Have you ever—who were you co-owners with there?

A. In the first place Mr. Cole and myself and Mr. Eddy was the owners.

Q. Did you locate on some mining claims there—file some mining locations notices?

Mr. HUNTINGTON.—Objected to as calling for secondary evidence and not the best evidence.

A. I did.

Q. What year?

Mr. HUNTINGTON.—Objected to as calling for secondary evidence and not the best evidence.

A. 1894.

Q. What year did you locate those claims?

A. Well, they are not all *have been* located at the same date; some of them in 1894, and some in 1895; went to work there in 1895.

Q. You went to work there in 1895?

A. Yes, sir.

Q. Now, do you recall whether any claims were located in 1897? A. Yes, sir.

Q. You located some claims? A. Yes, sir.

Q. Where were they in reference to the gorge?

A. Those three claims, one of them is on Section 28 I think, and just about where the reservoir is to

(Testimony of John W. Insenhofer.)

be built on Section 28.

Q. And were there any of the claims over in Section 28? [642—586] A. There was.

Q. Now, when was the first time you were ever in that gulch? A. In 1895.

Q. You had never been up there previous to that time—before that? A. No, sir.

Q. Now, then, you and Mr. Leonard Cole were the locators and afterwards became the owners of those claims? A. Yes, sir.

Q. Did you ever do any mining in there?

A. Yes, sir.

Q. What years were you in there mining?

A. Well, I mined—when I first started in there I mined up there on the upper end close up to the mouth of Mormon Basin Creek on a bar.

Q. Your first mining in there was at the mouth of Mormon Basin Creek on a bar?

A. Yes, sir. I worked there as long as there was water in Mormon Basin Creek and then I took my men—I had two men helping me—and I took my men down and we done some work on Twenty-seven. We picked rocks out of the creek and threwed them on the outside so as to give the water a show to run off so as to lower the channel. Then in 1896 we started in to clean out the ditch. When we bought the ditch it was all fitted up and when that work was done why we started in to sluicing just as quick as we could get the water through the dirt.

Q. Do you know where the dam is being built by the defendant company? A. I do.

(Testimony of John W. Insenhofer.)

Q. Have you been there since they have been at work upon it? [643—587] A. I have.

Q. You may state whether or not mining operations have ever been done by you or under your directions below the location where the dam site is.

A. I have done some mining work down below there.

Q. Has the mining work which you have done down below there been done on one or both sides of the creek?

A. It was done on both sides of the creek; we have rocked there and mined there for a little while.

Q. Above the dam you may state whether or not the mining work was *one* on one or both sides of the creek? A. Both sides above the dam.

Q. How far above the dam did you carry on mining operations?

A. Well, the biggest portion above the dam while I was there working was carried on, if anybody knows where the house stands now, it is a little up the creek.

Q. A little above the house where it stands now?

A. Yes, sir.

Q. How long did you keep possession of that ground as mining ground?

A. Well, I think I—do you mean altogether?

Q. Yes, sir, you and Mr. Cole?

A. Why, we kept possession up until now—not up until now but up until 1907.

Q. Until the time they transferred it to the present company? A. Yes, sir.

(Testimony of John W. Insenhofer.)

Q. From 1894, when it was filed upon, or from 1895 when you first went up to the property, down until the time it was transferred to this present company who was in possession of the ground?

A. Well, we was the owners of it. Sometimes we leased it and sometimes we worked it ourselves.

[644—588]

Q. But you were the owners of it?

A. Yes, sir.

Q. Did that ground produce gold?

A. Well, I couldn't say anything otherwise than what it did.

Q. Was your possession known to people open—was it known to many people that you all had possession of that property as mining ground?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial.

A. It was known to everybody that wanted to know it so far as that is concerned.

Q. Were you ever ejected or dispossessed?

A. Never had no trouble while I was there.

Q. Was there any objection or complaint made by anybody as to your occupancy of the property?

A. Never that I know of.

Q. Was your possession open and notorious, or was it secret and hidden?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial and leading.

A. It couldn't be hidden because we made a road to it and everybody could come down there and

(Testimony of John W. Insenhofer.)

everybody was welcome and so the whole world could come and see it if they wanted to. [645—589]

Cross-examination by Mr. HUNTINGTON.

Q. When you went there in 1895 I understood you to say that was the first time?

A. Yes, sir.

Q. Who was there at that time?

A. I had Mr. Auger and Mr. Blackwell—

Q. Well, I am talking—they went in with you—did they go down there with you?

A. They went with me.

Q. Was there anybody there when you went?

A. There was nobody there.

Q. And you took in—

A. Mr. Auger and Mr. Blackwell.

Q. What time of the year was it when you went there? A. In the spring of the year.

Q. How long did you stay there?

A. How long did I stay there?

Q. Yes, sir.

A. Well, I think I stayed there until 1897.

Q. All the time—did you live there in the canyon all that time?

A. I did; I stayed there all winter.

Q. Now, let me see. Do I understand you lived in the canyon from 1895 until 1907?

A. No, 1897.

Q. And you lived there all that time?

A. I might have gone to Huntington for a day or two. Go there and do my business and come back.

[646—590]

(Testimony of John W. Insenhofer.)

Q. Were you occupying the old Boswell cabin?

A. I was.

Q. In 1897 you went back to Huntington to stay?

A. In 1897 we bargained the claim to a man by the name of Martin.

Q. You bargained to sell it to a man by the name of Martin?

A. Yes, sir, and he took possession of it.

Q. How long did he stay there?

A. Well, now, I couldn't exactly tell you, but I think he was there over a year.

Q. Did he stay there in that same cabin?

A. Yes, sir.

Q. Were you there any time while he was living in there?

A. I wasn't over there but once while he was living in there.

Q. Where was he working at the time you were there?

A. He was working—do you know where the cabin stands at the present time?

Q. Yes, sir.

A. He was working right below there next to the creek.

Q. That was in above where the dam site is about a quarter of a mile? A. Just about, I guess.

Q. What was he doing? A. Mining.

Q. How was he—sluicing?

A. With hydraulics.

Q. Did he have the giant?

A. He had a giant we bought a giant when we

(Testimony of John W. Insenhofer.)

started in to work.

Q. How long did he stay there?

A. I couldn't exactly tell you but he stayed fully a year if not more. [647—591]

Q. Then who went in next?

A. Well, then we leased the ground to some Chinamen I think.

Q. Was this arrangement with Martin on an agreement to sell it to him? A. Yes, sir.

Q. But he didn't take it.

A. He couldn't raise the money.

Q. He couldn't raise the money or didn't want it?

A. He couldn't raise the money.

Q. Well, then, so in 1899 or 1900 you leased it to the Chinamen? A. I think so.

Q. 1900?

A. I couldn't tell you exactly the year.

Q. What arrangement did you make with the Chinaman? A. They had to pay us a royalty.

Q. How much?

A. I think twenty-five per cent.

Q. 25% of what they took out?

A. Yes, sir.

Q. They stayed in there how long?

A. I think they worked it for a couple of years.

Q. Aren't you mistaken about that, and didn't they come out the same fall they went in?

A. Well, now, I wouldn't be quite positive about that but I think it must have been a couple of years.

Q. After the Chinamen left there there was

(Testimony of John W. Insenhofer.)

nobody working there for some time—for a year or two?

A. Oh, yes, sir, there was a man in there by the name of John Titus.

Q. As soon as the Chinamen left?

A. Yes, sir. [648—592]

Q. How long did he stay there?

A. He was there two or three years.

Q. Under what arrangement did he work the claim? A. He worked it on a royalty.

Q. Do you remember how much the Chinamen paid you?

A. Well, now, I couldn't say as to that.

Q. Do you remember how much Titus paid you?

A. No, I don't. Mr. Cole took the money and so I didn't pay no attention to it.

Q. You don't remember what you got out of it?

A. No, I couldn't say.

Q. Who went in there after Titus quit?

A. A man by the name of Mr. Taylor bought it and he extended the ditches—that is, he bargained for it, and he extended the ditches.

Q. He bargained to buy it and extended the ditches? A. Yes, sir.

Q. How long did Taylor work there?

A. Well, now, that is another question I can't exactly answer.

Q. Were you in there any time while Taylor was there?

A. No, I wasn't. I was up in Huntington.

Q. Did he pay anything for the use of it?

(Testimony of John W. Insenhofer.)

A. Mr. Taylor never done much mining so far as that is concerned. He extended the ditches and made considerable improvements.

Q. What improvements did he make besides extending the ditches?

A. Well, he made considerable. Spent considerable improving upon the ditches. One ditch he cleaned out considerable, and I think he mined some but I don't know how much.

Q. Nor where? [649—593] A. No.

Q. Do you remember the year Mr. Taylor went there?

A. I think it must have been somewhere nears the year 1902 or somewheres along there, but I couldn't tell you exactly the years.

Q. Who went there after Taylor?

A. After Taylor left I went in there.

Q. What year did you go in?

A. I went there in 1903, I think.

Q. How long did you stay there?

A. I stayed there until Mr. Brogan took charge of the place.

Q. Were you there—do you mean to say you were in there all the time?

A. I was in there all the time.

Q. Where did you live?

A. Do you know Boswell's creek?

Q. The old Boswell cabin?

A. No, the old creek that comes in there called Boswell creek, where the old house used to stand. A fellow got a ranch up there—

(Testimony of John W. Insenhofer.)

Q. About a couple of miles above the dam site, isn't it?

A. Yes, sir. A fellow got a ranch up there and he went back to Chicago and he has got a small house and I stayed up there and come down there and done my work. It was just as handy to the work I was doing on the upper part of the claim and it was just as near as to stay down there in the big house.

Q. So you stayed in the house belonging to this man in Chicago?

A. Yes, sir.

Q. That was on Section 28, was it? [650—594]

A. What was?

Q. The cabin you lived in?

A. I couldn't tell you what section it is on.

Q. Do you know where the line is between Sections 28 and 21?

A. The line between Sections 28 and 21?

Q. Yes, sir.

A. I know where Section 28 so far as that is concerned.

Q. Do you know where the line runs there?

A. Yes, sir.

Q. Between Sections 21 and 28?

A. Yes, sir.

Q. Well, now, do you know where this cabin of the Chicago man is?

A. This cabin goes up that creek about a mile that comes in there by the Boswell house—about a mile. It is not by the creek.

Q. It is on the flat up the creek?

A. Yes, sir, there is some springs up there. A

(Testimony of John W. Insenhofer.)

fellow built a house and he went to Chicago and he would like for me to stay there and take care of the place and I stayed there and do my work down on the mine.

Q. How many acres did you mine on Section 21?

A. Well, Section—the way I got 21—27 and 28 joins don't they?

Q. Yes, sir, and 28 and 21 joins.

A. 21 and 28 joins?

Q. Yes, sir, 21 and 28 joins on the north.

A. Well, now, I actually don't know exactly where the division line is between the two sections, so far as the division line is concerned.

Q. I asked you that a minute ago and I thought you said you did? Where does the line between 27 and 28 cross the creek?

A. Where does the line between Sections 27 and 28 cross the [651—595] creek?

Q. Yes, sir.

A. Why, just about the end of the reservoir—the lower end of the reservoir; maybe a little on 27.

Q. It crosses right there by the reservoir?

A. Yes, sir.

Q. And part is on 27 and part on 28?

A. Well, I think a little of it would be on 27, on one point of it.

Q. Now, don't you think that the most of the dam would be on 27 and most of the reservoir would be on 28? A. Not most of the dam would be on 27.

Q. Do you know where the line run as to that rocky butte? A. Yes, sir.

(Testimony of John W. Insenhofer.)

Q. Well, where was it? Where is the line with respect to the rocky butte?

A. Where is the line as to the rocky butte?

Q. Yes, sir.

A. Well, the line runs—what rocky butte do you mean, on the left-hand side of the creek or right-hand side?

Q. On the right-hand side going up, or the left-hand side coming down.

A. I think it is pretty well—I think the line runs pretty well up towards the bluff up there.

Q. On the right-hand side or left-hand side as you go up?

A. On the left-hand side as you go up.

Q. Now, did you do any mining below the dam site? A. I have.

Q. Except just the taking of the rocks out of the creek?

A. Took the rocks out of the creek and took a rocker down there and rocked some down there.

[652—596]

Q. Whereabouts, how far down the creek?

A. Well, I have rocked some, I guess about a hundred yards down below the dam.

Q. Is that all?

A. Oh, I have rocked some a little farther down.

Q. Why didn't you run your ditch down there and use your hydraulic?

A. Well, a man couldn't do everything all at the same time. Once in a while a man has a couple of hours to spare, why he can do such a thing.

(Testimony of John W. Insenhofer.)

Q. If there was gold in paying quantities down there you would have done it?

Mr. HART.—Objected to as incompetent, immaterial and irrelevant.

A. If I owned the ground to-day I might get to it for a while.

Q. Well, if there had been—if you had found gold there in paying quantities when you were rocking wouldn't you have gone ahead with your ditch and hydraulic down there?

A. I have had so much mining ground there, so far as that is concerned, it would take a man more than a lifetime to work it all out.

Q. Now, I want to ask you again, how far up the creek you did your mining? How far was the uppermost mining you did on the creek above the present dam site?

A. You know where Mormon's Basin Creek comes in?

Q. Give us that in distances. Was it a mile or half a mile?

A. I never stepped that ground off.

Q. Couldn't you estimate it?

A. I could estimate it and make a mistake. If you are acquainted with that country you ought to know where Mormon Basin is. [653—597]

Q. I am not, and the Court isn't who is going to hear this testimony. I would like to know how far it is in miles.

A. That is a pretty hard thing for me to do. If I had measured the ground I could give it to you.

(Testimony of John W. Insenhofer.)

Q. Did you go as far up as five miles above the dam site? A. Well, I should say so.

Q. What is that? A. Yes, sir.

Q. Five miles?

A. No, you said "About the dam site."

Q. Did you mean as much as a mile above the dam site?

A. You mean where the dam is to be built at the present time?

Q. Yes, sir.

A. Why, yes, sir, I guess I mined about as much as two and a half miles. Now, mind you, I wouldn't take an oath to it.

Q. I understand you are giving us your best judgment.

A. About two and a half miles from the dam site.

Q. Do you know where the line is between Sections 20 and 21? A. I don't.

Q. You don't know whether you mined on twenty or twenty-one?

A. I couldn't tell you that. My work is there and I can show anybody where I did work.

Q. And you don't know whether you mined on Section 28 or 21? A. Mined on Section 28.

Q. You don't know whether you mined on Section 21 or 28 or both?

A. Well, I guess. Well, I mined on both of them.

Q. You mined on both 21 and 28?

A. Yes, sir, I have.

Q. Could you give us any estimate in the number of acres you mined on twenty-one?

(Testimony of John W. Insenhofer.)

A. I never measured them off so I couldn't tell you. I would [654—598] step off a piece of ground and work it, but that is so long ago I couldn't tell you that.

Q. You said you were owners of that claim. You don't mean by that you have got a patent for any of it? A. No, I have not got a patent for it.

Q. You simply filed a claim on part of that land and mined it? A. Certainly.

Q. That is all you mean? A. Certainly.

Q. Have you got any copies of your mining claims?

A. I guess they can be produced; I guess they are here.

Q. May I see them?

Mr. HART.—I haven't got them, Judge; I will have to get them for you. I intended to do that. We are having them made.

Mr. HUNTINGTON.—I wish I could refer to them while examining this witness.

Mr. HART.—We are going to put them in evidence.

Mr. HUNTINGTON.—I wanted to ask some questions in evidence.

Q. You filed on the land which you were mining, did you? A. The notices *is* recorded; yes, sir.

Q. And the notices describe the land you were mining? A. Yes, sir.

Q. Why didn't you get your patent for them, Mr. Insenhofer?

Mr. HART.—Objected to as incompetent and im-

(Testimony of John W. Insenhofer.)

material, and some of the best mines the world has ever had have existed for thirty years without patent—The Comstock.

Q. Why didn't you get patents for it?

A. Well, I tell you, so far as I am concerned, I didn't have the money to spare. That is a good reason, isn't it?

Q. But if that had been property that was paying property as [655—599] mining property don't you think you could have gotten money enough to have gotten a patent for it? It won't cost you ten dollars an acre.

A. I thought I had a perfect right to it as long as I had filed on it and had possession of it.

Q. But you never had money enough to pay for the patent and so you didn't get it?

A. No, I had too many good friends.

Mr. HART.—You mean by that they got the money away from you as soon as you got it out of the ground?

A. I mean I went on their bonds and notes and had to pay it.

Mr. HUNTINGTON.—Don't you think if you had good friends—

WITNESS.—I ain't like some of them—I didn't want to impose upon my friends.

Witness excused. [656—600]

[Testimony of R. A. Lockett, for Defendant.]

R. A. LOCKETT, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Where do you live, Mr. Lockett?

A. I live up near Dell on Gum Creek.

Q. Do you remember in what section you live?

A. Yes, sir.

Q. What is that? A. Section 8.

Q. What Township? A. Sixteen.

Q. And Range? A. Forty-three.

Q. How long have you lived at that place?

A. Nearly thirty years. Well, I have not lived continually there, I moved some on Willow Creek there, but I have owned the place that long and lived there a big part of the time.

Q. How long have you lived up on Willow Creek?

A. Well, it will be thirty years now soon. It will be thirty years this year since I moved there.

Q. How long have you lived in the State of Oregon? A. Well, about thirty-five years.

Q. And what county did you live in before you went up there? A. Umatilla.

Q. Are you acquainted with Mr. Leonard Cole?

A. Yes, sir.

Q. Are you acquainted with Mr. Emory Cole?

A. Yes, sir. [657—601]

Q. Do you know where Mr. Emory Cole's ranch is up there? A. Oh, yes, sir.

Q. How far is your place from Emory Cole's

(Testimony of R. A. Lockett.)

ranch? A. About six miles.

Q. Do you know—are you familiar with the gulch running up through which Willow Creek flows before it reaches Cole's ranch?

A. That is, you mean—

Q. That gulch or canyon, are you familiar with it? A. Above Cole's, do you mean?

Q. Yes, sir.

A. Well, I ain't really familiar with it. I have been by it and went in on the old road several times, struck in above where the mines are. It used to be a county road some of them said here.

Q. How long have you known of mines being in that country—that gorge?

A. Oh, ever since 1868 or '9.

Q. You have known of mines being in that gorge since 1868?

A. 1868 the big excitement was in Eldorado and them mines have been going on pretty near the same as Malheur City.

Q. What has been the reputation of the ground in through that canyon as to whether or not it is mining ground and mining claims for the last thirty-five years?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial.

A. They have been mining there more or less ever since.

Q. Has the property been generally known as mining property? [658—602]

Mr. HUNTINGTON.—Objected to as incompe-

(Testimony of R. A. Lockett.)

tent, immaterial and leading.

A. Oh, yes, sir.

Q. Have you known of Leonard Cole mining up in there?

A. Well, I knowed of him having the mines; I never was there when he was mining.

Q. Do you recall the time when you first learned of him owning mining claims in there?

Mr. HUNTINGTON.—Objected to as calling for hearsay evidence and immaterial.

Q. Do you recall about the year—what year was it?

A. Well, I guess about 1895. I remember they went in there about that time. Him and Insenhofer went to work there and they worked there off and on and when they wasn't working there they had other parties working there.

Mr. HUNTINGTON.—Confine yourself to what you know, yourself, and not what you have heard.

A. I know Leonard Cole and have known him since a boy.

Mr. HUNTINGTON.—But a minute ago you testified you didn't see him working there. Confine yourself to what you know.

Q. What age man are you, Mr. Lockett?

A. Seventy years old.

Q. Do you know whether or not Cole and Insenhofer had possession of this mining property until it was taken over by Mr. Brogan and his company?

Mr. HUNTINGTON.—Objected to as calling for

(Testimony of R. A. Lockett.)

the conclusion of the witness and leading. [659—603]

A. I know they always owned the mining ground and I know they made a transfer conveying this. That has been known all over the neighborhood—all over the creek there.

Q. Transfer of it to Brogan or his company?

A. Yes, sir.

Q. How far are you from the property that Mr. Brogan and his company has been improving up there? A. Well—which do you mean?

Q. Any portions of it?

A. Five miles from one of their reservoirs; they made the Pole Creek reservoir.

Q. How far are you from the place where they are setting out trees and orchards?

A. Fourteen miles, some of it.

Q. Have you seen the land they have been clearing and preparing for orchards and fruit?

A. Yes, sir.

Q. Do you know how many thousand fruit trees have been set out there by Mr. Brogan or the company since they commenced?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, immaterial and leading.

A. I don't know how many thousand but I know they have planted out quite a lot of land there in trees all right up there and I seen it and seen them irrigating them.

Q. Since your residence up in the valley have you had occasion to observe the flow of Willow

(Testimony of R. A. Lockett.)

Creek? A. Oh, yes, sir, some.

Q. Have you had occasion to observe the condition of the creek [660—604] during the spring freshets when it overflowed its banks through the early spring or late winter months?

A. I have several times.

Q. Have you also observed it during the months of June, July, August and September of various years? A. Some, yes, sir.

Q. Is there any irrigation from the creek through the months of June, July and August of the various years caused by flood water? A. No, sir.

Q. Does it make any difference to the condition of the creek during those months whether or not there was a flood or an overflow during the earlier part of the year? A. I think not.

Q. It goes dry just the same? A. Yes, sir.

Q. Have you had occasion to observe the land on Willow Creek when it would be overflowed—any of the land that would be overflowed?

A. Oh, yes, sir, early in the spring.

Q. About what season of the year, or what months would the overflow or flood waters come down? A. February, March and April.

Q. And along in through there. Where the water overflows a piece of land and stands on it in the valley—in valley land, does that produce, or can you raise alfalfa crops upon it?

A. No, sir, you can raise wire grass.

Q. What can you say as to whether or not the flooding of the land is a benefit or injury to the land?

(Testimony of R. A. Lockett.)

A. While there is lots of it it injures it so the hay is worthless. [661—605]

Q. Then, you would say as a general thing it is an injury to the land?

A. I would, generally, yes, sir. Where it stands on it a long time it all goes to wire grass.

Q. Now, do you know how the flood water has generally been regarded by the settlers in the valley as to whether it is a benefit or an injury to their land?

A. A great many of them think it is an injury.

Q. What land is flooded or overflowed when an overflow comes, is it high or low land that is?

A. Low land.

Q. Do you know of any of the persons using means by constructing ditches or embankments so as to prevent the floods from getting on the lands?

A. Yes, sir.

Q. After that was done you may state whether or not a better or bigger crop would be produced than was produced when the lands were overflowed.

A. How was that?

Q. After a person has built their embankment to keep the flood water off, or built a ditch so as to run the water off would the land produce a better crop if the water were kept off or if the water were not kept off?

A. I suppose it would if the water were kept off.

Q. In the valley do they have a season which is known as the rainy season or snow season?

A. Oh, yes, sir.

(Testimony of R. A. Lockett.)

Q. What time of the year does that come on?

A. Well, that varies; sometimes a little earlier and sometimes a little late; sometimes about Christmas and sometimes later. [662—606]

Q. When they have the rainy seasons?

A. Yes, sir.

Q. Now, when the rainy season starts in is it simply a spasmodic rain or for days and nights?

A. I have seen it rain for two or three days or nights, but they only come occasionally.

Q. How do they ordinarily come?

A. Well, they ordinarily come with a kind of an easy-going rain.

Q. Lasting how many hours?

A. Lasting sometimes thirty-four hours and sometimes thirty-six hours.

Q. Does snow fall? A. Yes, sir.

Q. What depth?

A. I have seen it three feet deep but we haven't had any sleighing for three winters.

Q. About what would be the average depth for the period of three years, in your judgment?

A. Six or eight inches.

Q. What effect does this fall of snow and these rains which you speak of have upon the soil upon which it falls as to whether or not it saturates the soil?

A. Why, yes, sir, sometimes I have seen it real muddy all over the country; it would mire a cow down.

Q. Thoroughly saturating the soil?

(Testimony of R. A. Lockett.)

A. Yes, sir.

Q. Even if flood water was turned upon land saturated as you have indicated by rain and snow water could it increase the saturation?

A. I should not think it would after such a saturation as that. It would be an injury to it.

[663—607]

Q. The flood water would be an injury to it?

A. Yes, sir.

Q. Are you familiar with the creeks running into Willow Creek below that gorge or canyon such as Gum Creek and Current Creek, Little Willow Creek and Black Creek and those other creeks?

A. I know all of them.

Q. The waters from these creeks, where does it finally go?

A. They all empty into Willow Creek.

Q. Do those creeks ever carry spring freshets or flood waters with them?

A. They do sometimes, heavy.

Q. Do waters from these creeks water any of the lands below them and contribute to the waters of Willow Creek?

A. Which lands?

Q. Any lands, the waters from any of these creeks or all of them?

A. They do some, early.

Q. Do you need any irrigation or any flooding to water the land during the months of February or March in this country?

Mr. HUNTINGTON.—Objected to as leading.

A. It would not need it.

Q. Well, you may state whether or not flood

(Testimony of R. A. Lockett.)

waters on the lands during February and March or April is needed or desirable.

Mr. HUNTINGTON.—Objected to as leading.

A. It is not desirable. [664—608]

Q. Are the lands usually during that period of time saturated?

A. Generally, as a rule, they are. Sometimes when the ground freezes, you know, they do not saturate so easily.

Q. If the ground freezes then if there was a flood on it would it sink into the ground or pass over it?

A. It slips right off.

Q. It runs off. What seasons of the year is it and what months when water is needed on ground so as to develop tree growth and vegetation?

A. April and May and June.

Q. And July?

A. Yes, sir, sometimes up to July.

Q. And August?

A. Well, generally the crops are over with, the majority of the crops, at that time, but still alfalfa it would be good in August.

Q. And the fruit trees? They need it?

A. Yes, sir.

Q. Then the truth is that the flood water when it does come does it come at a season of the year when anybody wants it?

Mr. HUNTINGTON.—Objected to as leading—all these questions are leading and I do not want to put in objections all the time.

A. No, sir. [665—609]

(Testimony of R. A. Lockett.)

Cross-examination by Mr. HUNTINGTON.

Q. Mr. Lockett, I understand you to say these lands which are overflowed along the creek would be better off if they were not overflowed, is that what you mean? A. Yes, sir.

Q. Now, suppose that they are overflowed but have a good drainage so that the water runs off of them as the creek recedes, isn't it true that kind of land produces wild hay?

A. It produces wild hay but then I cite you Grimes' place.

Q. I will call your attention to Grimes' place—

A. I used to own that place myself and it was a swampy wire grass ranch and he has dug through there now and he has alfalfa through there now and it does fine.

Q. I am not asking you about places where they are so low that water cannot go back into the creek, but take the land that is low enough so that it is flooded but high enough so that as the water recedes and flows back into the creek and run off of it, doesn't that kind of flooding produce a crop of wild hay? A. It has done that.

Q. Isn't it true that when you first came to this valley the only lands that produced any hay at all were the lands that from year to year was flooded to such an extent that the sagebrush and greasewood were killed off and the wild grass came up instead?

A. I don't know about the sagebrush being killed off.

Q. When the sagebrush *was the* wild grass grew

(Testimony of R. A. Lockett.)

up? A. I don't know about that. [666—610]

Q. When you first came to the country there was a long strip of wild hay—

A. That was rye grass; there was rye grass all along the creek, but it is all gone now.

Q. Just answer my question. Didn't the old settlers mow a considerable amount of land up and down the creek here for hay? A. They did.

Q. And that wasn't hay which they had sown but it was hay which grew up there wild and it was upon land annually overflowed?

A. Some patches were but they used to cut plenty of rye grass and that rye grass is all killed off now.

Q. The rye grass is all killed off? It doesn't grow only where it has some water?

A. It was in the sagebrush, the rye grass was all along there up the creek.

Q. Do you mean to say the rye grass grew on the bench lands and no sagebrush grew up there? Did the rye grass grow up there?

A. That grew all along the bottoms.

Q. All that you need is to get the sagebrush off and keep the stock off, don't you think it would spring up again?

A. It might in time, but it would take a long time.

Q. Let us come to the tracts of land which you say are so flooded that the water stands on them a long time and wire grass grows up. There was such a piece on the Grimes place?

(Testimony of R. A. Lockett.)

A. Yes, sir. Some; yes, sir.

Q. And then there was some on the Kelly place?

A. Yes, sir.

Q. And they drained their land? [667—611]

A. Yes, sir.

Q. And both of these places are flooded every year when the water is high enough?

A. They made ditches to take the water away.

Q. And then water runs out of those ditches when the water comes down?

A. They take it away.

Q. But they won't take it away until it begins to recede?

A. Yes, sir, and it don't leave them great lakes of water like they used to have.

Q. That is exactly the idea, the ditches don't stop the lakes from coming there but they simply take the water out.

A. I don't understand it that way.

Q. These drains you speak of empty into the channel of the creek, don't they?

A. Yes, sir, they bend so as to go into the creek again.

Q. Now, when the water is out over the banks of the creek, of course these drainage ditches will not carry the water off until the water drops down?

A. It is owing to how much water comes.

Q. But if it is big enough to get the water up over these low places then it has got to be big enough to overflow the banks of the creek?

A. Yes, sir, it has to overflow some of the banks.

(Testimony of R. A. Lockett.)

Q. Now, Mr. Kelly testified there was no overflow of these places this year and none last year.

A. Yes, sir.

Q. And Mr. Kelly says this year he harvested 90 tons of hay to the acre, and last year about the same and the year before that there was some overflow.

A. Yes, sir, some. [668—612]

Q. And the year before that he harvested 130 tons of hay, and the year before that he harvested 150 tons. Now, do you think that is a benefit to the land to dry it so that the tonnage of your hay crop is decreasing every year? Is that beneficial?

A. You say his hay decreased?

Q. So he testified. That being true do you think that is beneficial?

A. Some seasons are bad seasons for hay.

Q. Why?

A. Because it doesn't rain enough.

Q. And because there wasn't as much moisture to maintain the flow of the creek as usual?

A. There is places in them bottoms where they raised hay better this year than there has been—

Q. And some places they did not get any where they usually get some crop if it overflows?

A. Kelly got a pretty good crop and that drain was the principal cause of it.

Q. But he said before he built that drainage canal he got 130 and 150 tons off of his land and since he built that drainage canal he only got 90 tons.

Mr. HART.—Objected to as incompetent, immaterial and irrelevant.

(Testimony of R. A. Lockett.)

Q. Don't you know Mr. Norwood didn't get any hay crop this year?

A. He told me he got a pretty fair crop.

Q. Did you see his crop?

A. No, but he told me a few days ago he got a pretty fair crop, a good deal better than I expected.

[669—613]

Q. Did Mr. Norwood tell you he got a fair crop of hay from the land that was overflowed?

A. No, he didn't say about the overflow; he said he got a pretty fair crop.

Q. If he testified on the stand he didn't get any hay from the overflowed land you would believe that was true?

Mr. HART.—Objected to as incompetent, irrelevant and hearsay.

A. I don't know about that; I am telling you what he told me.

Q. Do you know the old Fox place?

A. Yes, sir, I know where it is but I haven't been on it for some years.

Q. Now, you have stated that some people along the creek think it is disadvantageous to have the land overflowed, there are some people who think it is beneficial? A. There might be some.

Q. Doesn't Mr. Scott think that way?

A. Mr. Scott hasn't got any overflowed land.

Q. And doesn't Mr. Faulkner think so and Mr. Norwood? A. I expect they do.

Q. Now, Mr. Lockett, you have spoken about sleighing here in the valley. What would you give

(Testimony of R. A. Lockett.)

to have three feet of snow here in the Willow Creek Valley? A. I never seen it but once.

Q. When was that?

A. I couldn't tell exactly the winter.

Q. A good many years ago? A. Yes, sir.

Q. What was the result the next year? [670—
614] A. A fine crop of bunch grass in the hills.

Q. I did not ask you about the bunch grass in the hills; we have not been talking about it. What effect did it have on the creek?

A. We had big waters in the creek.

Q. The last two years you haven't had much water? A. No, sir.

Q. The water this year was pretty much all taken out by the ditches the early part of the season, wasn't it? A. Yes, sir.

Q. The farmers along the middle and lower valley begin to irrigate just as soon as the water begins to flow in the spring, don't they?

A. Yes, sir.

Q. And they keep it up as long as there is any water to be had in their ditches? A. Yes, sir.

Q. When the lands are thoroughly saturated in the spring, either by overflow or otherwise, isn't it true that the amount of water that flows in the channel of the creek later in the spring is larger than when there has been no overflow?

A. Yes, sir, it is a natural consequence.

Q. The land along the creek gets soaked up and holds the water more or less and then it continues to seep back into the creek and keeps the stream run-

(Testimony of R. A. Lockett.)

ning a little longer than it would otherwise run?

A. Yes, sir.

Q. You have sold your land recently, haven't you?

A. Yes, sir.

Q. To this Willow River Land & Irrigation Company?

A. I did not sell to them. [671—615]

Q. To Mr. Brogan?

A. I sold to other parties and they sold to Brogan.

Q. Who did you sell to, please?

Mr. HART.—Objected to as immaterial.

A. Which, the land I sold? I have got some land left but I sold some.

Q. Who did you sell to? A. John Weaver.

Q. And then Weaver sold to Brogan?

A. Then Weaver sold to Brogan.

Q. Was the deed given—did you get your cash for the land or was it sold on a contract?

Mr. HART.—Objected to as immaterial.

A. I got my pay.

Q. How much land have you left up there?

A. I have got a quarter-section.

Q. And how much did you sell?

A. I sold about a section; I think I sold just a full section.

Q. Is that land watered by a ditch?

A. It was; yes, sir.

Q. And is the land you have got left irrigated by a ditch? A. Only by Gum Creek.

Q. The creeks lower down the valley, the small creeks, run off early in the season generally, don't

(Testimony of R. A. Lockett.)

they? A. Yes, sir.

Q. And in a short time; it turns warm more quickly down here than farther up in the mountains? [672—616] A. Sometimes it does.

Q. Isn't that true?

A. Generally speaking; I have known some thaws come up in Cow Valley and after it came and the high water came down before it would thaw down where I live.

Q. Generally speaking the nearer it gets to Snake River the earlier it gets warm?

A. Well, yes, sir; that is the rule.

Q. How many times have you been in the canyon up where these so-called placer mines are since 1895?

A. I don't know as I have been there since that; I was there before that though.

Q. All that you know about anything that has been done since 1895 was simply what you have heard? A. I have not been there since.

Q. You haven't any personal knowledge of it at all?

A. All I know is there has been mines there for years and years.

Q. You know though that Mr. Boswell mined up there at some time? A. Yes, sir.

Q. He mined there about as long as anybody, didn't he, any one continuous person?

A. He mined there quite a while. I know I seen his work there as I went along.

(Testimony of R. A. Lockett.)

Q. He did about as much placer mining there as anybody?

A. I don't know how long. He never mined anything since I have been acquainted—he was mining there some when I first went along there away back 25 years ago; thirty years ago. [673—617]

Redirect Examination by Mr. HART.

Q. Those ditches or drains—what counsel called “drains,” that was built at Mr. Kelly's place: I will ask you if they do not prevent the flood water from flowing onto his land?

Mr. HUNTINGTON.—Objected to as leading.

A. That is what they were built for.

Q. Counsel asked you if land that was annually overflowed, practically that, would not produce wire grass, or wild grass—wild grass, and I understood you to say “Yes, sir, at times,” is that correct?

A. At times it does.

Q. Such lands as he speaks of that would be overflowed annually would that be low land?

A. Yes, sir, it would be low land.

Q. If the land was prevented from being overflowed at all would it produce a better grass?

A. I explained that at the Grimes place.

Q. I say if the land was prevented from being overflowed at all would it produce a better grass?

A. Yes, sir.

Q. Then, the land in being overflowed is injured by the overflow? A. Yes, sir.

Q. Now, you said something about Mr. Grimes'

(Testimony of R. A. Lockett.)

place, you used to own that? A. Yes, sir.

[674—618]

Q. At that time, or in the past, was it subject to overflow?

A. The worst kind; a regular duck lake.

Q. And after the water in the creek receded, why then the water that overflowed the land gradually went off?

Mr. HUNTINGTON.—Objected to as leading.

A. Very slowly; yes, sir.

Q. And then what kind of grass grew there?

A. Wire grass and slough grass.

Q. Was anything put in so as to prevent the land from being overflowed? A. Not then, no.

Q. Has there ever been?

A. Yes, sir; lately.

Q. What was the effect of that upon the vegetation that grows there?

A. It makes it better; a better quality of hay.

Recross-examination by Mr. HUNTINGTON.

Q. But Mr. Grimes has been irrigating that same land, hasn't he?

A. He has irrigated some spots of it lately. He has not irrigated that alfalfa, that grows without irrigation that he sowed in that low land. He has got a drain through it [675—619] and it grows without irrigation.

Q. I wish that you would explain how it is that these drains you speak of prevent the land from being overflowed.

(Testimony of R. A. Lockett.)

A. Why, that is a natural consequence. It is higher for the water to go off.

Q. But if the water doesn't get onto it at all how can it run off? A. Well, it runs on it I guess.

Q. Do you mean to say that it has raised the elevation of the land so the water cannot get onto it now?

A. The water don't get onto that alfalfa; that was fixed so the water couldn't get onto it.

Q. Take the Kelly land: That has drainage ditches, the slope of the ditch isn't very much, is it?

A. In places the water runs pretty rapidly.

Q. But it was built to drain the water off?

Mr. HART.—Objected to as incompetent as the witness testified that it was built to prevent the flood water from getting onto the land.

Q. It was also built to take the water off?

A. That is what it was built for; it was to drain the land and keep it from standing on the field.

Q. It was built to drain the land but it don't keep it from getting there in the first place? It was built so that when the water in the creek gets low enough the water can be run off so that there is a chance for a drainage? A. It was built to drain it.

Q. But if the water in the creek is as high as the land of course it would not run off? [676—620]

A. Not for a time. It would go pretty quick, quicker than it used to or before the drains were made.

Q. If the land were situated so the land would naturally drain itself, then do I understand you to

(Testimony of R. A. Lockett.)

say that they would be better off then if they never had any water at all on it? A. No.

Q. If there were proper drainage then flowing for a week or ten days or two weeks would be beneficial if they were raising wild hay there?

A. Why, yes, sir, a certain amount of water is beneficial, of course, but too much is pretty bad.

Q. And particularly it is bad if it were allowed to stand there for a long time? A. Yes, sir.

Re-redirect Examination by Mr. HART.

Q. But the same land that would raise wild hay if it didn't have a flooding would raise alfalfa?

A. Yes, sir.

Q. And alfalfa is worth a great deal more than wild hay? A. That is what they all say.

Q. And there would be enough moisture falling on the land in the shape of rain and snow and enough moisture coming down from these high places is enough to keep it wet to raise alfalfa?
[677—621]

Mr. HUNTINGTON.—Objected to as leading.

A. That would be an improvement.

Q. And the counsel is trying to mislead or misunderstand your evidence as to the drainage ditch, or ditch built by Kelly. Now, if the ditch is sunk down low the water simply runs off instead of overflowing and that is what has been done on Kelly's place? A. Yes, sir.

Q. Before that was done the land was always overflowed and after that was done the water simply

(Testimony of R. A. Lockett.)

ran off quick and never got over his land and wouldn't overflow? A. That is right.

Re-recross-examination by Mr. HUNTINGTON.

Q. As counsel has assisted you by putting the words into your mouth, Mr. Lockett, a drainage ditch will not drain water off the land if water never gets on it, will it?

Mr. HART.—Objected to as incompetent as witness has never said it would; he said it would not overflow.

A. I should not think it would if water never got on it.

Q. You have said these lands which are overflowed for a little while would produce wild hay. And then counsel has said [678—622] to you, but if they were not overflowed they would produce alfalfa. Do you mean to say that kind of land if it did not get any kind of water on it at all except as it depended upon the rains and snows—

A. And the seepage.

Q. (Continued.)—and the seepage. Not from irrigated land, assuming now there was no irrigated land above it—no artificial irrigation—do you mean to say it would produce alfalfa?

A. How is it Grimes' lands raise alfalfa?

Q. He irrigates above it; doesn't he have a water right, and doesn't he use it?

A. He has said—

Q. We want what you know about the fact.

A. Grimes said he had used too much water.

(Testimony of R. A. Lockett.)

Mr. HUNTINGTON.—We ask to have the answer stricken out as incompetent, irrelevant and hearsay.

Q. Now, he may have used too much water; that may be true, and every farmer uses too much water at times if he can get it.

A. That seems to be a failing.

Q. Now, if the lands above a tract of land that is low is irrigated then you can raise alfalfa upon it with proper cultivation, if there is seepage water enough to come down and alfalfa will not grow without water?

Mr. HART.—Objected to as it is an argument that counsel is putting up and addressing to the witness and incompetent, irrelevant and improper. [679—623]

A. Well, alfalfa does grow without irrigation in certain spots of land.

Q. Does it have no irrigation above it?

A. Well, the seepage will make it grow if there is irrigation above it. That has been proven that alfalfa will grow without irrigation if it has got seepage enough. That has been proven out to perfection.

Q. But these lowlands which are generally overflowed do have an opportunity, but are so situated that water has an opportunity to flow off promptly if they are situated below unirrigated lands, would not produce alfalfa?

A. Well, we have had alfalfa there and have irrigated it once in the spring and got a good crop and then a good crop of seed.

Q. If you gave it a good soaking in the spring it

(Testimony of R. A. Lockett.)

might produce a crop?

A. A fine crop too; that has been tried too.

Q. Isn't it true that some of these low lands, that is, with proper drainage and getting the one soaking in the spring would produce alfalfa?

A. They have done it without a soaking.

Q. And do it with a soaking?

A. Too much water will kill alfalfa.

Q. And that is true on all lands?

A. I have alfalfa drowned out.

Q. You can drown out any vegetation if you keep water on it long enough.

A. I have seen alfalfa get a good start in this swamp land and then I have seen these big water years come and kill every bit out.

Q. How long does water have to stand on alfalfa before it will [680—624] kill it?

A. A month or two weeks or something like that.

Q. If it stood on it for five or six days, would it?

A. No, if it was drained off right quick it don't hurt it much.

Q. If it came on from five to six inches deep, or from two to six inches deep say on a tract of ground and then drained right off within a few days would that kind of ground raise alfalfa?

A. Yes, sir, it might do pretty well, but too much water will not do it any good.

Witness excused.

At the hour of 9:30 o'clock P. M., July 26th, 1909, adjourned until 9:00 o'clock A. M., July 27th, 1909.

At the hour of 9:00 o'clock A. M., July 27th, 1909, met pursuant to adjournment as above. Present: Same as before. [681—625]

[Testimony of Emory Cole, for Defendant.]

EMORY COLE, a witness produced on behalf of the defendant, after being duly sworn, testified as follows:

(Examined by Mr. HART.)

Q. Mr. Cole, what age man are you?

A. I am about forty-seven.

Q. How long have you lived in Willow Creek Valley?

A. In the vicinity along Willow Creek ever since 1868.

Q. The property—have you been in attendance on this hearing and all since it has been going on?

A. Yes, sir.

Q. The property that has been spoken of as the Cole ranch, what property does that have reference to? What ownership; is that the property you have owned?

A. The property I owned and sold to Mr. Brogan.

Q. Or the defendant company?

A. Or the defendant company.

Q. About how long have you lived on that place known as the Cole property?

A. Since in the '70's; 1871 and '2.

Q. Have you had occasion since your residence in the valley to notice and observe the rainfall and the flow and overflow of Willow Creek?

A. Yes, sir.

(Testimony of Emory Cole.)

Q. Have you also had occasion to observe the effect of the overflow from Willow Creek on the soil and vegetation? A. Yes, sir; I think I have.

Q. Have you at any time assisted in the measurement or had [682—626] charge of the measurement of the flow of water on Willow Creek?

A. Yes, sir.

Q. Do you know where the town or place called Dell is—the postoffice or place called Dell?

A. Yes, sir.

Q. How far is it from this property of yours?

A. About six miles or five miles.

Q. This side; that is, south of the place where you lived? A. South and east.

Q. Now, what years was it that you measured, had occasion to particularly observe the flow of water in the creek? A. In May, 1894, was one year.

Q. May, 1894?

A. I think that was the year.

Q. That was the year you were assisting some of the Government officials? A. Yes, sir.

Q. Do you mean 1894 or 1904? A. 1904.

Q. Then, outside of that, have you had occasion in other years to observe the flow both before and since that year? A. Yes, sir.

Q. What season of the year is it that most of the water comes down?

A. Well, it varies, sometimes in January, and on until May.

Q. Varies from January until May?

A. Yes, sir.

(Testimony of Emory Cole.)

Q. Well, more often when does the larger volume of water come down?

A. In February until May. [683—627]

Q. February until May? A. Yes, sir.

Q. Now, in the year 1904, when you say you made particular and careful observation of it, I wish you would state if you know the volume of water coming down by Dell expressed in acre-feet for the months of February, March, April and May, if you remember.

A. Well, my understanding from the measurements that we took, the results were something like 100,000 acre-feet in that period.

Q. At other years I will ask you whether or not larger volumes of water for the same period of time flowed down? A. There has.

Q. And, on the other hand, you may state whether or not smaller volumes have flowed down?

A. There has.

Q. Now, what do you think would be the average for those months?

A. Well, I think that the year of 1904 was about an average.

Q. 1904, you think, was about an average?

A. Yes, sir.

Q. Now, you are a brother of Mr. Leonard Cole?

A. Yes, sir.

Q. Are you familiar with the gorge beyond and north of your property through which Willow Creek passes? A. Yes, sir; tolerable.

Q. Are you familiar with the location of the min-

(Testimony of Emory Cole.)

ing claims owned there by your brother, Insenhofer and others? A. I have been there frequently.

Q. You know the location of the ground?

A. Yes, sir. [684—628]

Q. How long—or when did your brother first go in there and commence mining operations?

Mr. HUNTINGTON.—This is all subject to our general objection to all this class of testimony.

Mr. HART.—Yes, sir.

A. Well, it was sometime in—I think it was about 12 years ago.

Q. That would be in 1894 or '5 then?

A. Yes, sir.

Mr. HUNTINGTON.—If it was 12 years ago it would be 1896 or '7.

Mr. HART.—Yes, sir.

Q. Well, at any rate, your recollection is that he has been in there at least twelve years?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Now, do you know whether or not he has carried on mining operations in the canyon since that time, since he first commenced?

A. Well, so far as I know he has been in possession of that and working in there during the working season.

Q. Has his possession been public or open and notorious or secret and hidden?

Mr. HUNTINGTON.—Objected to as leading, and calling for the conclusion of the witness.

A. I will change the question. What has been the

(Testimony of Emory Cole.)

character of his possession?

A. Well, it has been open and notorious so far as I ever knew [685—629] anything about it at all.

Q. What has been the character of it so far as the people living in that portion of the country or passing through there would know or learn?

A. There has been no effort that I have ever heard of to keep it any secret at all.

Q. Has it been generally known as his property?
Mr. HUNTINGTON.—Objected to as leading.

A. That was my understanding of it, yes, sir.

Q. You may state what the general knowledge is, if you know, as to his possession and the manner of his possession.

A. He has not been molested in any way that I know of. He has offered it for sale a number of times, and has been negotiating in different ways and I never heard of anyone objecting.

Q. Now, do you know where the dam site is that is being constructed by the defendant company?

A. I do.

Q. Have you been to the place since the work has been going on?
A. Yes, sir.

Q. Having reference to that location, I will ask you do you know whether or not, or how long have you known that mining operations were carried on in that gulch, or how many years?

A. There was mining in there when I first went there, the first time I was ever there, and I think that was in 1874 or 1873, or along there sometime.

Q. Even at that time you may state what was the

(Testimony of Emory Cole.)

general reputation [686—630] of the ground as to whether or not it was mining property or carried gold or mineral.

Mr. HUNTINGTON.—Objected to as hearsay, not the best evidence, incompetent and immaterial.

A. That was the reputation of it so far as I know.

Q. You may state what has been the reputation of the ground as to whether or not it carried gold and mineral since 1873 when you first went there up to the time the property was transferred to the defendant company.

Mr. HUNTINGTON.—Objected to as hearsay, not the best evidence, incompetent and immaterial.

A. It has been always considered mining ground.

Q. Now, since 1873, about how often have you visited or been in that canyon?

A. Well, I think I have been there every year and sometimes a dozen times a year.

Q. Can you state whether or not mining operations have been carried on in the canyon yearly?

A. I couldn't say for sure that there has been continuous from the first time I was there until the present time.

Q. Well, have you seen people in there at work mining since 1873 off and on?

Mr. HUNTINGTON.—Objected to as leading.

A. Very frequently.

Q. What seasons of the year would you say you saw them in there [687—631] at work?

A. Most generally in the spring.

Q. Have you visited the property at other seasons

(Testimony of Emory Cole.)

of the year; for instance, along in the fall or early winter?

A. I have been up there in the winter very often.

Q. Can you state whether or not the work which they would be doing is mining, or which they had left could be observed by observation?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Describe what you could see from time to time showing whether or not work had been done.

A. Well, for a good many years they was there working in a number of different places and along the ground and occasionally I would see some new work I hadn't seen when I was there before, and so on.

Q. Now, in reference to where the dam site is located, you may state where the work was which you have seen or where you have seen men at work mining, whether above or below the dam site?

A. I have not seen anyone mining below the dam site, but I have seen signs of mining being done there.

Q. Have you seen them mining above the dam site? A. Yes, sir.

Q. Did you ever see any signs of mining having been done also above the dam site?

Mr. HUNTINGTON.—Objected to as leading.

[688—632]

A. Yes, sir.

Q. Now, in reference to the two sides of the creek I wish you would state what you have seen as to mining.

(Testimony of Emory Cole.)

A. Well, I have seen them hydraulicing on both sides of the creek, and I have seen prospect holes on both sides of the creek.

Q. Have you seen them working on both sides of the creek?

A. Yes, sir; I have seen men working on both sides of the creek.

Q. Now, commencing where the dam site is on below that, how far up the creek would you see the men either mining or see evidence of where they have been mining?

A. Well, there has been evidence of mining along in different places all the way up to Mormon Basin Creek and the ditch up the creek I have seen them up in there at the head of the ditch.

Q. About how many miles up would that be?

A. I think about four or five miles.

Q. Above the dam site? A. Yes, sir.

Q. Would that be applicable to both sides of the creek or one side?

A. Above the mouth of Mormon Basin on one side of the creek and below there it was on both sides.

Q. Are you familiar—I will call your attention—do you know generally where the lines in Section 21 are? A. No, sir.

Q. Up above the dam? A. I do not.

Q. You don't know where those lines are?

A. No, sir. [689—633]

Q. Well, if Section 21 is within, say, a mile to two miles runs in that manner commencing about a mile above the dam and runs from that on about two miles

(Testimony of Emory Cole.)

farther up above the dam, you may state whether or not they carried on mining operations in Section 21, assuming the creek crossed through or on Section 21.

A. Well, there is mining on both sides of the creek.

Q. And if Section 21 was on one side of the creek then there would be mining on Section 21?

A. There certainly would.

Q. Now, I believe you stated you had transferred your property to the defendant company corporation?

A. Most of it; yes, sir.

Q. You may state whether or not that carried the water rights and appropriations of water which you owned.

Mr. HUNTINGTON.—Objected to as leading.

A. It did.

Q. How much water appropriations or water rights did you own at that place?

A. About all the water I could get.

Q. Well, had you then appropriated all the water of Willow Creek?

A. Lots of times.

Q. How long had the water—or where does your land lie in reference to the spreading out of the valley at the south end of the gorge?

A. Well, it lies right up against the foothill.

Q. Your land then is the first agricultural land that is reached after the creek comes down through the gorge? [690—634]

A. Yes, sir.

Q. This water that you speak of having appropriated and used upon the land has been used on it for how many years?

(Testimony of Emory Cole.)

A. Well, I think as much as twenty-five or thirty years, perhaps.

Q. How many acres of land are there in that tract of yours? A. About 2,500 acres.

Q. Now, do you know the effect of the overflow water upon that portion of land of Willow Creek which is overflowed either annually or occasionally as the case may be?

A. Well, I have some knowledge of it; yes, sir.

Q. You may state whether or not the land is benefitted; that is, the land as it lies in the valley of Willow Creek which is overflowed? You may state whether the overflow to the specific pieces of property that are overflowed, whether they are benefitted thereby or not?

A. In some cases it might be a benefit, but, to a great many, it is a detriment.

Q. How is it generally regarded by the farmers and persons living in the valley?

Mr. HUNTINGTON.—Objected to as incompetent, immaterial and not the best evidence.

Q. State whether or not it is regarded as a benefit or a detriment.

Mr. HUNTINGTON.—As the farmers of the valley are within access of this hearing and the best evidence is the testimony of the farmers themselves.

A. Well, I believe the majority of them considers it a detriment. [691—635]

Q. Do you know of any precautions being taken by any of the parties to prevent the lands from being overflowed?

(Testimony of Emory Cole.)

A. Well, they have all built some drain ditches and some levees to protect their land.

Q. Land that is overflowed, would that be high land or low land? A. Low land.

Q. When it is subject to overflow and that is all what class of vegetation grows upon it?

A. Some wild hay.

Q. On the same land that wild hay grows upon, because of the overflow, what would grow upon the land considering its character and the lowness of it, what would grow upon the land if the overflow were shut off?

A. There would be alfalfa grow upon it.

Q. Then which would be the most valuable—alfalfa land or wild hay land? A. Alfalfa.

Q. Will alfalfa grow upon land that is subject to overflow, and that is yearly, or annually, or practically so, overflowed by the waters of Willow Creek, the lowlands that are overflowed there; will alfalfa grow upon it?

A. No, it is no good for it; it is not good land for alfalfa.

Q. Will alfalfa grow upon such lands located in such a way if subject to overflow such as occur there?

A. Not very long.

Q. You say it would not very long. Do you mean through a dry year it might grow and if the water overflowed over it it would still live?

Mr. HUNTINGTON.—Objected to as leading.

[692—636]

A. Yes, sir; in a dry year it might grow and do

(Testimony of Emory Cole.)

well, and if the water would run over it it would kill it.

Q. If there were alfalfa there when the overflow came, what effect would it have?

A. It would kill it.

Q. I wish you would name—or have you yourself made any effort to protect any part or portion of your land from the overflows? A. I have.

Q. What portions of your land—about how much?

A. Well, I have had considerable overflowed land, and I have worked more or less on it to control or govern the overflow and manage it the best I could.

Q. Would the efforts which you have made be toward keeping the water from flowing over the land?

A. A portion of it was to keep the water—I couldn't keep off the land, which had to overflow it anyhow—to spread it out so as to be as thin as possible and stop any wash that might occur from one year to the other, and keep it entirely off of what I could of it.

Q. And portions of it that you couldn't keep the water off of, as I understand you to say, your effort was to drain that and other portions to keep the water entirely off of?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Do you know of other farmers making efforts so as to keep their lands from being overflowed?

A. Yes, sir.

(Testimony of Emory Cole.)

Q. What other farmers have done that? [693—637]

A. Mr. Kelly, Mr. Grimes—they are the main ones I know of.

Q. What effect has their—or did they prevent their lands from being flooded?

A. They claimed to.

Q. What effect on the quality of the vegetation has resulted if you know by preventing the water from flowing over the land?

A. Mr. Grimes stated it was a great improvement.

Mr. HUNTINGTON.—Move to strike out as hearsay and incompetent.

Q. State what you know from your own observation.

A. I know he raised good alfalfa on land that it hadn't been raided on on account of the overflow; from changing the channels and conveying the water into channels he was able to raise a good quality of alfalfa seed and hay.

Q. Now, in speaking of the appropriation of water made for your land, how long a time have you been appropriating water? How long has it been since the water was first appropriated?

A. Sometime in 1872, '3 or along there.

Q. Are there any riparian owners of agricultural lands above yours? A. None that I know of.

Q. That is, on this side of the gorge?

A. Yes, sir.

Q. How much water have you been annually

(Testimony of Emory Cole.)

using as a general thing?

A. Well, I don't know as to that.

Q. Well, how much in comparison to the amount flowing in the creek? [694—638]

A. Well, a very short time in the spring there would be more than we could use and after that we took it all. Whenever the ditches would hold it we took it all.

Q. I wish you would describe the canyon at the place where the dam site is located and for say a mile or a mile and a quarter on north; that is, as to the sides of the canyon and how far they extend up.

A. Well, it widens out considerably from the dam site on up to a mile I guess, and then it varies along, of course, from there on narrow and wide.

Q. How high are the sides of the canyon?

A. The sides of the mountains?

Q. Yes, sir.

A. Why, I should think they are from a quarter to a half a mile.

Q. You may state whether the sides of the canyon are capable of raising crops, farming or agricultural.

A. There is no agricultural land on the sides of those hills I would consider.

Q. You may state what the value of those lands are from the canyon from the dam site on up for a mile and a half or two miles. What the value of them is per acre.

A. Well, other than mineral values I would not think they have any worth mentioning.

(Testimony of Emory Cole.)

Q. Taking out the mineral value you would say it has no value worth mentioning?

A. Yes, sir.

Q. Give me an idea at any rate, whether five cents or fifty cents or any other sum of the value per acre they would be worth along through Sections 27, 21 and 28.

A. Well, I have did a good deal of experimenting to find out [695—639] what the values are, but I have not arrived at it yet; I couldn't say.

Q. Well, what would you say as to 50¢ an acre?

Mr. HUNTINGTON.—Objected to as leading and witness says he is not able to answer the question.

A. It might be worth it; I don't know.

Q. In your judgment are they worth that much per acre?

Mr. HUNTINGTON.—Objected to as leading and witness says he is not able to answer the question.

A. I would not give it.

Mr. HUNTINGTON.—Move to strike out the answer of the witness as not responsive to the question and as incompetent and immaterial.

Q. Mr. Cole, are you familiar with the lands which the defendant (plaintiff) company may own in the valley of Willow Creek from and including the Section 31, Township 15 South, Range 43 East, down the valley to the south and toward this way into the land in Township 17 South, Range 44 East? Are you familiar with the company's properties lying along the valley?

(Testimony of Emory Cole.)

A. Well, I am more or less familiar with the country.

Q. Are you familiar or what would you say as to the fair price or the value of such lands as the company owns that are flooded and that have not been otherwise improved—how much are they worth?

A. I have not been over the land for some time and I don't [696—640] know what they are worth. It depends upon the condition they are in, of course.

Q. Well, the condition with sagebrush still growing on portions of them and occasionally, either annually or otherwise, the low parts are submerged with water?

Mr. HUNTINGTON.—Objected to as incompetent, and witness has stated he has not been over them and doesn't know.

Q. What I am asking is the value of those that are overflowed, the land overflowed if there are forty acres still overflowed, with sagebrush and greasewood growing upon it and raising wild grass and the water comes over it annually or nearly so what would be its value?

Mr. HUNTINGTON.—Objected to as incompetent, and witness has stated he has not been over them and doesn't know.

A. Well, I don't know; it might vary considerable.

Q. Well, you may state your opinion as to the average value of such land.

(Testimony of Emory Cole.)

Mr. HUNTINGTON.—Objected to as incompetent, and witness has stated he has not been over them and doesn't know.

A. Oh, it might be from \$1.25 to \$10.00 an acre, I don't know.

Q. From \$1.25 to \$10.00 an acre?

A. Yes, sir.

Q. Are you familiar with the condition of Willow Creek as it annually appears through the months of say June, July and August and September? [697—641] A. I am.

Q. Is there any difference in the amount of water found in Willow Creek through those summer months and throughout all the years whether there are floods or no floods?

A. Well, there is a great many places you cannot find any but there are places where there are holes.

Q. And that same condition exists whether they have flood water or do not have flood water—through the summer?

Mr. HUNTINGTON.—Objected to as leading.

A. Practically, yes, sir.

Q. Then there is practically no difference in the condition of the creek through the dry seasons of the year?

Mr. HUNTINGTON.—Objected to as leading.

A. No difference in regard to the flow of water because there is no flow there.

(Testimony of Emory Cole.)

Cross-examination by Mr. HUNTINGTON.

Q. The measurements you speak of having made in 1904 were made at the bridge about six miles above the Postoffice at Dell?

A. Yes, sir. [698—642]

Q. The water that comes down through that part of the channel are waters which come out of the canyon? That is, there are no tributaries to Willow Creek between that point and where the water comes out of the canyon, are there?

A. Well, there is Baker Creek on one side and Road Canyon on the other side is all.

Q. Are they considerable tributaries or is the water from them—

A. Baker Creek is considerable of a stream in the early season.

Q. But it flows out and goes dry later on?

A. It goes dry varying from May until, well, from May until the first of June.

Q. With those exceptions, however, the water is the water that comes out of the canyon?

A. Yes, sir.

Q. Now, how did you make those measurements?

A. With a *guage* the Government prepared—Mr. Whistler and Newell.

Q. That doesn't quite answer the question in regard to how you measured it.

A. Measured from the box they prepared to the surface of the water.

Q. What kind of an instrument did you use to measure with? A. A chain and a weight.

(Testimony of Emory Cole.)

Q. Just state so that the Court can understand just what you did to get the measurements from day to day.

A. Well, just as I stated before, I measured the surface of the water and they calculated the rest of it themselves.

Q. Then the amount of water that you have stated is not your own calculation but your recollection of what they told you was the calculation?
[699—643]

A. Yes, sir.

Q. Do you remember how wide the wier was through which the water passed?

A. It varied very much. The dam, or the bridge that the measurement was taken from was about 140 feet long. It stood up above the water and they measured from the bridge to the surface of the water and the other parties to the affair took *them* measurements. I don't know anything about them at all. That was their—

Q. Was there no box or wier constructed, or did you just take the measurements in the natural channel of the creek?

A. Measured the surface of the water to the bridge.

Q. They measured the width?

A. They sounded, as near as I can remember about every week and sometimes every three days. They would have a man come there and sound the creek and take the current and all.

Q. What part of the work did you do?

A. I measured from the bridge down to the

(Testimony of Emory Cole.)

surface of the water.

Q. You measured the distance from the bridge down to the surface of the water? A. Yes, sir.

Q. Then you took simply the measurement of the distance from the surface of the water up to the bridge? A. Yes, sir.

Q. Other people took the measurement of the depth of the water from the surface to the bottom?

A. Yes, sir.

Q. And you did not measure then, yourself—you did not make any other measurement yourself?

A. None at all. I took their figures for the balance of it.

Q. How long were you there? [700—644]

A. I was there—

Q. Making the measurements, I mean.

A. At each visit?

Q. No, I mean when did you begin to make the measurements and when did you cease to make them? A. I forget the dates.

Q. Did it cover more than a month?

A. Something like a year.

Q. Were the measurements made every day?

A. Practically every day. Once in a while there would be a day we would be away.

Q. Nearly every day during the year?

A. Yes, sir.

Q. Was there water flowing through the creek there during the entire year?

A. Some water—well, I believe there was a time there wasn't any water but then I wouldn't be posi-

(Testimony of Emory Cole.)

tive, but anyhow my instruction was to report those occasions.

Q. Isn't it true that the measurements showed some water during every month covering that period?

A. Possibly so; I wouldn't say there wasn't. I remember my instructions was to report the same when there was no water as when there was, or something to that effect.

Q. Do you remember what month there was the least water?

A. January, I think, was a very low month; that is, so far as the *guage* reading went and along in the summer.

Q. February and March were very much larger?

A. Yes, sir, I think so; yes, sir.

Q. And April was the largest?

A. I believe it was; yes, sir.

Q. Then August or September would be the least months—the [701—645] least flow, wouldn't it?

A. Yes, sir, I think so.

Q. Now, as a matter of fact, do you remember the exact acre-feet measured?

A. I don't remember the figures exactly. You have them there, haven't you?

Q. That year there was a very large flow in the month of March, wasn't there?

A. I don't remember the months that give the most water.

Q. Do you know what the size of your ditch is by which you appropriate water from Willow Creek?

(Testimony of Emory Cole.)

A. Well, it—I think I do.

Q. Give it to us.

A. It is about three and a half feet wide and I calculated it to hold water up to about that depth.

Q. Three and a half feet wide and three and a half feet deep? A. Yes, sir.

Q. Are the banks of your ditch all the way along as much as 3½ feet high from the point where you divert the water down to where you use it on your land?

A. That is the way we aimed to have it when we cleaned it out.

Q. What is the grade of your ditch?

A. I don't know; it is very swift though.

Q. You never have measured it?

A. I don't know as I could measure it.

Q. Do you know of its ever having been measured? A. I think it has been.

Q. It was measured that same season, wasn't it?

A. Perhaps.

Q. And it was in use at the time that you were making these measurements of the flow of water in the creek? [702—646] A. Yes, sir.

Q. And your ditch takes the water out where?

A. Above this bridge about two miles, something over two miles I think.

Q. Have you ever looked at the report of the Government Engineers as to the amount of water discharged into your ditch?

A. I don't think I have. I know it was very little that year because I was raising alfalfa seed and did

(Testimony of Emory Cole.)

not want to irrigate the land.

Q. You didn't get as much then as you ordinarily do?

A. Why, I got just what I wanted out of what there was and that is what I ordinarily do.

Q. During any period—during any month of that year did you get as much water as you ordinarily take? A. I don't know.

Q. You don't know? A. No.

Q. What proportion of the water that you usually take did you take during that year?

A. I don't know that.

Q. As much as a half? A. Perhaps.

Q. As much as three-fourths?

A. I don't know.

Q. You don't know? A. No, sir.

Q. Did you irrigate very much during the year 1905? A. No, not very much.

Q. About the same as you did in 1904?

A. I think so. [703—647]

Q. Or more?

A. I don't know, but I think perhaps less. I don't know. I have been trying to raise seed, experimenting raising alfalfa seed by getting the water off and driving it out of late years.

Q. How many years and during what years did you reduce the flow of water under your ditch in that way?

A. Well, ever since I have been raising alfalfa seed; that is, trying to. Well, about four or five years I have been experimenting with it in that way.

(Testimony of Emory Cole.)

Q. Four or five years consecutively?

A. Yes, sir.

Q. You left, you think, half of the water at least that you had been using go down the creek?

A. I think so.

Q. During what months do you generally irrigate most, or did you irrigate most during the year 1904?

A. I think it was pretty early in the season. I didn't aim to irrigate late at all.

Q. Have you never taken the elevation—the different in elevation between your headgate and the point where you begin to distribute your water on the land? A. I have not.

Q. Could you give us any idea of that?

A. Not definitely. I have seen the figures the Government give but I don't remember.

Q. Could you give us your best recollection of that?

A. I couldn't very well, to make it anywhere near correct because I have forgotten what they are.

Q. How long is your ditch?

A. About two miles. [704—648]

Q. Is it on the same grade all the way or is there a difference in the grade? A. It varies.

Q. Where is the heaviest grade?

A. Well, the heaviest grade from the upper end down is—I couldn't describe it very well.

Q. In what part of the ditch would you find the steepest grade?

A. There is a little flat where the ditch comes out onto the flat there I have been told it had four and a

(Testimony of Emory Cole.)

half feet of drop in one place; probably be three hundred yards long or four feet of a drop—

Q. How far is that from the creek?

A. (Continued.)—after it first gets on top of the bank out over to the hillside; then in two other places above that.

Q. How far is that place from your headgate?

A. From the headgate it would be about half a mile.

Q. From the headgate to this steep drop how much is the fall?

A. Well, it is heavy enough so that it would carry the very muddiest water that comes down from the mines was the intention of it.

Q. You don't know, as a matter of fact, what the real grade was for the first thousand feet?

A. No, I don't.

Q. Do you have a box at your headgate, or do you just turn the water in out of the dam without anything?

A. We have had a number of boxes there but they are buried out in the gravel around there and we change it in the spring in opening it up and open it up in the most convenient way.

Q. Do you have a box there?

A. We have a box in the ditch where the headgate once was. [705—649]

Q. The channel of the creek has changed?

A. The channel of the creek changed.

Q. So that you are not now taking the water in at the old channel but out of a new channel?

(Testimony of Emory Cole.)

A. We are taking it out higher up.

Q. Is that a new channel or the old one?

A. It is the old channel—that is a new channel, the old channel very much widened.

Q. How many acres do you irrigate when you are using your water to the full?

A. Well, about 900 acres, I think, is under an irrigation system of some kind.

Q. And that is all supplied from this ditch?

A. No, sir.

Q. Well, how much—how many acres do you irrigate by the water carried through this ditch?

A. Well, there is 500 acres, I guess, that it is mixed up on. Other streams are running into it in the same fields and so on.

Q. Five hundred acres and a part of that is partially irrigated by other water? A. Yes, sir.

Q. How many acre-feet do you use in irrigating your land? A. I don't know.

Q. Don't you know what is usually used, or what is considered a proper amount?

A. No, sir, I don't. I know that it varies very much.

Q. Now how many acres altogether did you convey—you said about 2500 acres?

A. Yes, sir, about that.

Q. Is all of that in one body or are there segregated pieces? [706—650]

A. It all connects except 160, I believe.

Q. All but 160 acres are in one body?

A. Yes, sir.

(Testimony of Emory Cole.)

Q. When you say "connect" you don't mean cornering but contiguous? A. Joining on.

Q. How many acres are there below your ditch—the ditch you have been talking about?

A. The Willow Creek ditch?

Q. Yes, sir.

A. Oh, I guess there are seven or eight hundred acres, or nine hundred perhaps.

Q. From seven to nine hundred acres?

A. Yes, sir.

Q. This low land you have talked about, that it had too much water, is below the ditch?

A. Yes, sir.

Q. And your irrigated lands would drain into that? A. Yes, sir.

Q. Did you construct that ditch yourself, or was it built when you went there?

A. My father built it.

Q. Were you there at the time? A. Yes, sir.

Q. The 160 acres was never irrigated from Willow Creek? A. Which 160?

Q. The segregated 160 acres? A. No.

Q. And Willow Creek doesn't run through that?

A. No, sir.

Q. This overflowed land, after you had drained it, was productive, [707—651] was it?

A. Yes, sir.

Q. If that overflowed land had received no drainage from your irrigated lands and had no water been put upon it during the year except what would fall naturally from the skies, and was overflowed an-

(Testimony of Emory Cole.)

nually but drained properly, it would still produce, wouldn't it? A. I think it would.

Q. And if it was properly drained the overflowing—the annual overflowing would be a benefit to it, wouldn't it, if it received no other irrigation?

A. If it was raising alfalfa it would not.

Q. But it wouldn't raise alfalfa anyway if it is low enough so the water would stand over it from a week to ten days or two weeks? A. No, sir.

Q. But it would raise wild hay, wouldn't it?

A. Yes, sir.

Q. And some other hay crops?

A. If it was taken care of in the right way and wasn't allowed to gully into ditches, and when it was you couldn't get the crop when it had been raised, as was the case in a great many cases.

Q. If the water in Willow Creek was reduced to such an extent that it never did overflow at all and you did not irrigate it, and it didn't get any seepage from higher irrigated land, it would not produce anything, would it?

A. If it didn't get any water at all it would not produce anything.

Q. I mean any water except what fell from Heaven.

A. I don't know of any other place to get water.

[708—652]

Q. I mean—you understand what I mean. (Previous question read to witness.)

A. If it didn't get any water it wouldn't produce any crop.

(Testimony of Emory Cole.)

Q. That is, if it doesn't get any water except the natural precipitation which falls directly upon it, which would come to it without irrigation of adjoining lands, or being overflowed, it would not in ordinary years produce any crop, would it?

A. Well, I never seen any of that bottom land any year but what it would produce a crop.

Q. Well, are there any bottom lands of that kind but what would get the benefit of irrigation of adjoining lands that you know of?

A. Why, I don't know of any.

Q. What do you consider that land worth, Mr. Cole?

Mr. HART.—Objected to as incompetent.

A. It depends upon the crop you can raise on it and the market.

Q. I am talking about that particular land?

A. Which particular land?

Q. The land you have been talking about on the place you used to own that was formerly flooded and you have drained it?

A. Well, some of it, where it was flooded too much we didn't get any crop, and where it was too dry we didn't get any crop.

Q. Well, that land you consider worth from fifty to \$100.00 an acre, don't you?

A. With means of irrigation it is.

Q. Without irrigation? [709—653]

A. You can't raise anything without irrigation. What is the good of it?

Q. I am talking about these low lands that it over-

(Testimony of Emory Cole.)

flowed? That you say doesn't need irrigation.

A. I don't know as I understand the question.

Q. What do you consider the land we have been talking of, that was a part of the land you formerly owned, which was so low that you had to drain it, worth?

A. That land with the water right I had use of?

Q. No, taking away the water right and depending simply upon the irrigation it would get from overflowing?

Mr. HART.—Objected to as incompetent unless the question also includes the condition of the land unimproved.

A. I have some land there, or have had, that hasn't had anything except the natural overflow that the crops haven't been anything except willows and weeds and fox tail and cockle burrs and numerous other things.

Q. Well, now, if you will just try to answer my question I shall be glad. Read the question again. (Two previous questions read to witness.)

A. Taking away all of the care that I gave it?

Q. No. A. Or adding that to it?

Q. Taking it as it is.

A. Well, that is with the care that has got and the crops it has produced?

Q. I don't care anything about what crops it has produced, but I am saying take the land in the condition it is, what is the value of it? What is it worth without any water right? [710—654]

A. It has a water right.

(Testimony of Emory Cole.)

Q. Do you irrigate it? A. Yes, sir.

Q. Do you still consider that land needs some irrigation? A. Certainly it does.

Q. Now, without irrigation what do you consider it worth?

A. I can't see any value to it if it hasn't any water or right of irrigation.

Q. Now, Mr. Cole, taking the lands along the valley that are annually overflowed, but are so situated that the water recedes from them as soon as the water is again confined to the banks of the creek; that is, land upon which the water spreads out for a short time and flows back again into the creek with the receding of the flood waters, those lands will produce crops of wild hay, won't it?

A. Some of them will.

Q. And some of them are profitable for that purpose and of value?

A. Dry land that has no other source of water except the flood water in the season as it varies I don't believe has much value.

Q. But it has some value?

A. Oh, I suppose it has.

Q. And without the flooding of that land—now, assuming that it didn't get that flooding it would not produce anything, would it?

A. No, if it don't get water it wouldn't produce anything.

Q. You were a witness on behalf of the Eastern Oregon Land Company in the protest it filed against the approval of the maps and plans of the Malheur

(Testimony of Emory Cole.)

Irrigation Company, the hearing being held at Ontario before Mr. King, were you not? [711—655]

A. Yes, sir.

Q. And in that hearing the same contention was made by the Eastern Oregon Land Company with respect to these overflowed lands that has been made in this hearing, wasn't it?

Mr. HART.—Objected to as incompetent, immaterial and as to what the contentions were which were made in that hearing and is not binding and not proper cross-examination.

A. It might have been; I wouldn't say.

Q. And you testified in that hearing, didn't you, that the Eastern Oregon Land Company's lands along Willow Creek, or portions of them were annually overflowed and inundated by the flood waters of Willow Creek and that when the waters receded from such lands the lands would produce wild hay and when it did not get those flood waters the lands would produce nothing, didn't you?

A. I may have; it could be the fact.

Q. That is the fact?

A. Yes, sir, it would produce something if it gets irrigation—

Q. And without that flood—read the last question. (Last question read to witness.) You also testified in that hearing that by reason of this annual overflowing of the lands the lands became saturated with water and subirrigated and as a result of that the flow in the Willow Creek the lower part of the valley would continue later in the season than if there

(Testimony of Emory Cole.)

was no such flooding of the valley, didn't you?

Mr. HART.—Objected to as incompetent, immaterial and not proper cross-examination. [712—656]

A. I think I did.

Q. And that is the fact, isn't it? A. Yes, sir.

Q. You understand by flood water the quantity of water which comes down the creek in the season of high water that is in excess of what the channel of the creek naturally carries and is the water which spreads out over the low lands? That is flood water as you understand it?

A. My understanding of flood waters would be the waters that is in excess of the creek channel and the ditches and appropriations and so on.

Q. Well, we are talking about the natural flow of the creek, and when you mean flood waters the ditches take part of the flood water, don't they?

Z. I suppose so.

Q. So that is really a part of the excess flow of the natural channel of the creek? A. Yes, sir.

Q. Now, Mr. Cole, if the valley was deprived of this flood water—I refer now to the valley below the canyon—is it not true that the riparian lands along the creek would be greatly damaged by reason of the fact that the flow of water in the creek would discontinue much sooner in the season than it would if the flood waters were allowed to come down in their natural way?

A. I suppose it would tend to shorten the season, of course.

Q. And it would tend to make it more difficult to

(Testimony of Emory Cole.)

get water for any purpose in the latter part of the season, wouldn't it? A. I think so.

Q. Now, referring to the possession of those mining claims up [713—657] there: You were in the habit of going up there for—on stock purposes, weren't you? A. Yes, sir.

Q. That is, you were riding after stock?

A. Yes, sir.

Q. And other stockmen were also riding over that country? A. Yes, sir.

Q. Stock ran up in there more or less?

A. Yes, sir.

Q. The people who were engaged in mining there did not undertake to exclude others from coming in there?

A. Only by rights to the claim, I presume, I never investigated.

Q. But other people did go in there and prospectors went in there? A. Yes, sir.

Q. No objection was made by these people from coming onto the ground and using it for pasture purposes? A. No objection made to me.

Q. Could you give us any idea of the acreage of ground that was being mined over in the canyon, say from the dam site on up?

A. Well, I don't believe I could give anything like an accurate one.

Q. These places where they were mining generally were on the bars in the creek or on the sides but were not continuous; that is, it wasn't a continuous mining all the way up, but they would mine one place here

(Testimony of Emory Cole.)

and then farther up in another place and so on, and there were considerable stretches of the canyon that were not mined at all, weren't there?

A. Well, I don't know of any place of any distance of any consequence from below the dam site up to the head of the [714—658] ditch that there has not been some mining done, every bar or every little flat or hillside.

Q. You don't mean to say there was ever any mining done below the dam site except prospecting and perhaps a little sluicing with hand sluicing?

A. There was a good deal of hand sluicing and prospecting and rocker work done.

Q. Very much done below the dam site?

A. I have heard people say they worked there.

Q. Did you ever see any place there where that was done? A. Yes, sir.

Q. Where was that?

A. Below the dam and from there on down until the last five or six years. There was a waterspout came down and obliterated a few of those places.

Q. And there was no mining done down there to open those places up so far as you know?

A. No, no mining done that I know of.

Q. I didn't understand you to say that there were people in there on those grounds every year from 1895 on down? You were in there a good many times when you didn't see anyone there?

A. I was there a good many times when I didn't see anyone there but I don't remember any year that I didn't see signs of men being there—tools there and

(Testimony of Emory Cole.)

signs of occupancy.

Q. The flumes and sluices were left there all the time?

A. The flumes and sluices were left there all the time; yes, sir; pipes and nozzles and tools.

Q. What tools were left there all the time?

A. Part of the blacksmith shop and anvil and bel-lows.

Q. Where was that situated? [715—659]

A. Northeast of the house.

Q. You say northeast of the house, do you mean the old Boswell cabin? A. Yes, sir, a few feet.

Q. Where is Mormon Basin relative to this dam site?

A. North—well, northerly direction from there about six miles or seven.

Q. Do I understand that you have conveyed all of your land to the defendant company or to Mr. Brogan? A. No, sir.

Q. How much land do you still own up there?

A. Well, I conveyed all the land I had in that one tract and 1600 acres besides that, and since that I have purchased back from Mr. Brogan about 80 acres, or something like that—two legal subdivisions, what there is of them that is on that tract.

Q. What part of the land did you purchase back, do you remember?

A. Well, it is where the buildings are and the orchard—from the orchard north to the creek.

Q. Are you a stockholder in the defendant company? A. Yes, sir.

(Testimony of Emory Cole.)

Q. You toake as part payment for some of your lands stock in the defendant company?

A. Yes, sir.

Q. How much stock do you own?

Mr. HART.—Objected to as incompetent, irrelevant and not proper cross-examination.

A. Well, I haven't received any stock yet by contract. I expect to. [716—660]

Q. How much are you to receive?

A. Thirty thousand dollars of stock (\$30,000.00).

Q. And how much did you receive, or how much were you to receive in all for your 2500 acres of land, and that included your water rights, did it?

A. Yes, sir.

Q. Including all the water rights and land and all that you conveyed?

A. Between Eighty and Ninety thousand dollars.

Q. Can't you give us the exact amount?

A. Well, no, the exact amount is not determined yet in regard to a few little details.

Q. Are any of those details in any way dependent upon the result of this suit? A. No, sir.

Q. You are acquainted with Mr. Grimes?

A. Yes, sir.

Q. He has left this part of the State, hasn't he, he and his family? A. I think so.

Q. Speaking of alfalfa: Alfalfa will stand a flooding several days, will it not? A. Yes, sir.

Q. About how long will it stand a flooding of water?

A. Well, in cool weather and the water moving

(Testimony of Emory Cole.)

rapidly it will stand very much longer than it will in hot weather and the water standing still.

Q. Well, give us some idea in cool weather with the water moving?

A. Well, I don't know very definite about that.

Q. Well, give us your best judgment about that.

[717—661]

A. It will recover sometimes after being run over by cool water for, well, a few weeks.

Q. A few weeks? A. Yes, sir.

Q. But in warm weather and with the water practically stagnant it would kill it in a few days?

A. A few days; yes, sir.

Q. The condition of the soil as to drainage would have something to do with it also?

A. I think so.

Q. If it had good drainage underneath and the water would drain well it would stand more soaking than if the land was a bottom, so to speak, with a bedrock under it preventing the drainage of the water? A. Yes, sir.

Q. So that lands along the creek where the creek forms a drainage channel would stand more flooding than lands farther back that were low down where the waters could not drain into the creek? That would be true, wouldn't it?

A. I suppose, so; yes, sir.

Q. Your effort to control the water was in building drainage canals, was it?

A. Well, I have made some effort to build irrigation canals also.

(Testimony of Emory Cole.)

Q. You have made an effort to build irrigating canals?

A. Yes, sir, more than I have drainage.

Q. Your irrigation canals are for the purpose of conveying the water onto the land? A. Yes, sir.

Q. And the drainage canals are to convey it off? Now, in draining you drain back into the creek?

[718—662]

A. Yes, sir, or into some lower place.

Q. How much of a drainage canal have you built?

A. Well, along some time in the '70's I built a ditch—father and Thompson and some others built a ditch down through what is known as the swamp for drainage purposes and irrigation also.

Q. That is, you took the water out of this low place that is swampy and carried it onto other land that was still lower?

A. Yes, sir, and then about the same time, or these same years '70 until '80 they built another ditch along the outside of the swamp. That is one of the canals used by Mr. Edwards and Kelly to irrigate.

Q. Now, this swamp land is land that is swampy in part because of its receiving a supply of water from other sources than Willow Creek, isn't it?

A. Perhaps.

Q. Isn't it subject to, or doesn't it receive water from some of those small creeks that come down on the side of the valley?

A. Why, I suppose so; yes, sir.

Q. So that it not only got the flood water but it

(Testimony of Emory Cole.)

got other waters in excess of the needs of the land?
That is true, isn't it? A. Yes, sir.

Q. You were asked about the height of the hills in the canyon up there and you said from a quarter to half a mile high. Did you mean that the slope from the canyon, from the bottom of the canyon up to the top of the hill is from a quarter to half a mile? A. Yes, sir.

Q. You don't mean they are from a quarter to half a mile [719—663] perpendicular?

A. No, they are not perpendicular, only in places.

Q. Cattle range in that country? A. Yes, sir.

Q. And they go to the creek in the canyon there after water? A. In a few places.

Q. If it were impossible for them to get to water the adjacent lands would be depreciated in value, wouldn't they, for pasture purposes?

A. Well, there is a great deal of that distance from my place up they cannot get to it.

Q. They can get to it from down there opposite the dam site just above on Section 27?

A. Yes, sir, there is a place there they come down.

Q. And they can get down to water on Section 21?

A. I don't know how the section lines run.

Q. You don't know how the section lines run?

A. No.

Redirect Examination by Mr. HART.

Q. Counsel asked you, Mr. Cole, about the drainage canals and irrigation canals and embankments—did he, or did he not ask you about embankments? Are there embankments built at different places so

(Testimony of Emory Cole.)

as to keep the water from overflowing the land?

[720—664]

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Do these drainage canals also act for the purpose of preventing the water from overflowing the land?

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. Yes, sir.

Q. Counsel asked you some hypothetical questions as to the value of land, in substance, if all the water was taken from it and including the possibility of irrigation, water rights and everything else. Land in that condition and as it originally exists and as it lays in nature, what is it worth? Has it any value? A. Very little.

Q. In your answer to one of counsel's questions you spoke of a portion of your land that was overflowed and that all it raised was willows, wild grass and cockle burrs, or whatever they are. What is the value of that land?

A. Well, as it exists is has very little value.

Q. Well, a dollar an acre or half a dollar an acre?

A. Well, I should think that was plenty.

Q. Well, is that about the same quality of land as the Eastern Oregon Land Company owns that is overflowed?

Mr. HUNTINGTON.—Objected to as leading.

Q. Well, you may state how that land compares with the lands owned by the Eastern Oregon Land

(Testimony of Emory Cole.)

Company which are overflowed. [721—665]

Mr. HUNTINGTON.—Objected to as leading.

A. Well, they did own some of this very land.

Q. Well, the lands they own down in other sections at the present time?

A. I suppose they are similar.

Q. Now, the fact is that all of the low land that is overflowed or occasionally overflowed by the waters whenever they occur, it is all very low land, isn't it?

Mr. HUNTINGTON.—Objected to as leading.

A. Generally.

Q. You may state whether or not it has seepage from the higher lands.

Mr. HUNTINGTON.—Objected to as leading.

A. Bound to have from the other lands.

Q. It has seepage from the other lands?

A. Yes, sir.

Q. I desire to offer a small table in evidence prepared by the Department of the Interior taken from the United States Geological Survey for the year 1904 published and issued from the Government printing office at Washington City in 1905. I refer to the table found at the bottom of page 218. Have you any objection?

Mr. HUNTINGTON.—With the understanding that I may use any part of that publication that I may desire upon examination.

Mr. HART.—Well, I don't know as to that. There may be inaccuracies [722—666] as to other tables. I wish to offer it in evidence.

Mr. HUNTINGTON.—I will make no objection to

(Testimony of Emory Cole.)

the offer provided however that any portion of the publication may be used by counsel for either—in the case.

Mr. HART.—I cannot accept a blind proposition of that kind because I don't know what you may have; therefore, if you are objecting to it I will proceed and take up the time necessary to produce written evidence in another way to produce what I wish.

Mr. HUNTINGTON.—I withdraw my objection to this and I want the book offered in evidence. I want the table just as it is.

Mr. HART.—I don't want to introduce the book.

Mr. HUNTINGTON.—Then I object to it unless the other tables and other data contained in the book relative to the flow of water in Willow Creek contained in the book are also offered in evidence with the table, and if any part of this publication is offered in evidence we will insist that all of the publication relating to this subject matter be put in evidence also.

Mr. HART.—I am offering the table here in evidence, or was going to offer it upon stipulation with counsel because it is a table that I understand and there are a lot of photographs in this book that I don't understand and don't know what they mean. Therefore, I cannot accept a stipulation that has added qualifications.

Q. I hand you, Mr. Cole, a copy of a book issued by the Government of the United States from the Department of the Interior pertaining to the Geological Surveys for the year 1905 published 1905

(Testimony of Emory Cole.)

and I call your attention in this⁴ book to the specific table found at the bottom of page 218. [723—667] Will you kindly look at same?

Mr. HUNTINGTON.—Object to witness being permitted to testify concerning that table or its contents, and objects to the witness using this table as an assistance to him in testifying unless it appears that this table was prepared by himself or under his direct supervision and was prepared at the time of the alleged estimations or computations.

Q. The table, Mr. Cole, I call your attention to being at the bottom of Page 218 and is under the table “Estimated monthly discharge of Willow Creek near Dell, Oregon, for 1904.” Now, I understand you to say in your examination a moment ago that the measurements were taken under a bridge some few miles above Dell, is that true? A. Yes, sir.

Q. That bridge is how far from your residence?

A. About a quarter of a mile I think.

Q. About a quarter of a mile. Now, having looked at the table and refreshed your memory and also from your general knowledge of the flow of water in Willow Creek, I wish you would state the number of acre-feet that passed there during the month of January, 1904.

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence and for the further reason that the table submitted to the witness indicates upon its face that the information called for by the question is not the result of measurement but is an estimate and the table is prepared by someone else than

(Testimony of Emory Cole.)

the witness and is the estimate of [724—668] someone else than the witness.

Mr. HART.—Your same objection can go to all of these questions.

Q. Now, you may state the number of acre-feet for January. A. January was 615.

Q. Now you may state the number of acre-feet for February.

Mr. HUNTINGTON.—Same objection as to February.

A. 12,710.

Q. Now, you may state the number of acre-feet for March.

Mr. HUNTINGTON.—Same objection as to March.

A. 48,140.

Q. Now, you may state the number of acre-feet for April.

Mr. HUNTINGTON.—Same objection as to April.

A. 37,130.

Q. Now, you may state the number of acre-feet for May.

Mr. HUNTINGTON.—That is objected to for all the reasons above stated other than the one based upon the fact that the table shows for itself that it is estimated.

Q. You may state the number of acre-feet for May. A. 10,020.

Q. Now, you may state the number of acre-feet for June.

(Testimony of Emory Cole.)

Mr. HUNTINGTON.—Our objection now goes to all the [725—669] balance of this.

Mr. HART.—Yes, sir.

A. 1,886.

Q. Now, you may state the number of acre-feet for July.

Mr. HUNTINGTON.—Same objection as to July.

A. 422.

Q. Now, you may state the number of acre-feet for August. A. 31.

Q. Now, you may state the number of acre-feet for September. A. 116.

Q. You may state the number of acre-feet for October. A. 579.

Q. You may state the number of acre-feet for November. A. 530.

Q. You may state the number of acre-feet for December. A. 750.

Q. Now, you may state the number of acre-feet for the whole year. A. 112,900 acre-feet.

Q. Now, you may state as to whether or not the figures which are placed there *are* the estimates which were made at that time in your judgment are reasonable and fair and as nearly accurate as possible.

Mr. HUNTINGTON.—Objected to as incompetent, this witness not having been shown to have had any part in the making of the measurements or being in any way capable of making any measurements except the measurements of the height [726—670] of the water from the surface of the bridge, and not

(Testimony of Emory Cole.)

being shown to have any qualifications to determine anything about the acre-feet of discharge from any measurement or observation which he may have made there. Counsel for complainant states that he will make no objection to the introduction of the table as it is printed, provided the other data relating to the measurements made at this same place by the same officers and contained in the same publication are also offered in evidence, the tables themselves as contained in the book to be made a part of the record of this case. And provided further that the same estimates and publication made for the year 1905 covering the same data are also allowed to go into the record in this case.

Mr. HART.—Counsel for defendant will have to again state that there are things in this book that he does not understand, does not know and has never had explained to him. And, as to the book of 1905 which counsel speaks of, if such a book was ever issued counsel for defendant never saw it and has no knowledge upon it and cannot accept a blind proposition of that kind.

WITNESS.—(Answering question.) They were.

Q. Were you consulted in the making of these estimates at that time?

Mr. HUNTINGTON.—We make the same objection to this.

A. Yes, sir. [727—671]

Recross-examination by Mr. HUNTINGTON.

Q. How did you determine the acre-feet flowing past a given point at a given time?

(Testimony of Emory Cole.)

A. I did not determine it.

Q. Then you don't know anything about the acre-feet passing at a given time, do you?

A. Only what they told me.

Q. Only what the engineers who were there and made this publication told you? A. Yes, sir.

Q. And that is all you know about it?

A. Yes, sir.

Q. When you were asked as to whether this was a fair and reasonable estimation of the amount of water you simply intended to say that you assumed that these people who told you so told you the truth?

A. Yes, sir.

Mr. HUNTINGTON.—Now we move to strike out the evidence of this witness relating to this matter as incompetent and hearsay.

Q. Did you make measurements for the year 1905 at this same point? A. I think I did.

Q. In the same manner? A. Yes, sir.

Q. And based upon the measurements which were made in 1905 a similar table was prepared, wasn't it? A. Yes, sir. [728—672]

Q. And those figures are just as accurate so far as you know as the figures contained in this report for 1904? A. Practically so, yes, sir.

Re-redirect Examination by Mr. HART.

Q. Down below your place, I think in Section 31, the creek flows in well-defined banks, doesn't it?

Mr. HUNTINGTON.—Objected to as leading.

A. Thirty-one? I don't know as I know just which—

(Testimony of Emory Cole.)

Q. Well, at this place where you made these measurements are the banks of the creek well defined? A. Tolerable well; yes, sir.

Q. Does all the water pass through that that comes down the lower creek?

A. No, there are some tributaries comes in below.

Q. Well, so the water that comes down through the canyon does it all pass through this place?

A. Yes, sir.

Q. Can you tell the number of miles per hour that the water flows on an average through there? Give your best judgment of it. Say for the months of February, March, April, May and along in through there. [729—673]

Mr. HUNTINGTON.—Objected to as incompetent.

A. It would only be a guess; I wouldn't know.

Q. I don't want it as a guess but if you have an estimate or an opinion as to the amount, the number of miles it flows or possibly the highest number and the lowest number why we would like it.

Mr. HUNTINGTON.—Objected to as incompetent.

A. It is very swift as a rule when it is high.

Q. Swift as a rule? A. Yes, sir.

Q. Well, about how many miles per hour would it be? A. I should think five miles.

Q. You would think five miles an hour; you think that would be a fair average?

A. Yes, sir.

Q. Now, what are the heights of the banks of

(Testimony of Emory Cole.)

that creek along there? A. At the bridge?

Q. Yes, sir, where these measurements were made. A. I think about ten feet.

Q. You think the banks were 10 feet high along there? A. Yes, sir.

Q. Does the creek ever overflow the banks along there? A. It never overflows them; no.

Q. What is the height of the water in those banks as it passes along there? How high have you noted it? That is, how deep is the water?

A. Well, it has been pretty deep. That is, nearly full at one [730—674] time, lacking a couple of feet of being full under the bridge.

Q. A couple of feet to the top of the bank?

A. Yes, sir.

Q. Well, during the months of February, and March and April and parts of May until it recedes what would be the average depth in feet of the water?

Mr. HUNTINGTON.—Objected to as incompetent.

A. Why, I should think—what months did you say?

Q. February and March. 1

A. That would be including the flood that comes sometimes during that time of the year?

A. Yes, sir; what would be the average?

A. Why, eight or nine feet.

Q. You think it would fill up and stay up?

A. Well, at the time now—during those whole period of those months?

Q. You are talking of the highest time?

(Testimony of Emory Cole.)

A. Yes, sir.

Q. I mean during those times does it remain stationary at all during those months?

A. No, indeed.

Q. Sometimes it does what?

A. It would go from a foot on up.

Q. Sometimes it would be deeper and sometimes shallower?

A. Yes, sir.

Q. Well, it begins to rise and fill up during what month?

A. Sometimes in January; sometimes in February.

Q. Well, ordinarily, the general year, take it as a pattern? [731—675]

A. February more frequently.

Q. Then, does it as an ordinary thing increase during the months of March and April?

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. It fluctuates considerably.

Q. It fluctuates considerably during March and April. You may state whether there is an increase or decrease during the latter part of February and the month of March ordinarily.

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. It begins to run down after March.

Q. It begins to run down after March. Now, through the month of February, according to the estimate which you made, there is not as much water discharged or goes through there—the volume of

(Testimony of Emory Cole.)

water isn't so great as in either March or April?

A. February is not so much—

Q. In 1904?

Mr. HUNTINGTON.—Objected to as leading and referring to data which this witness knows nothing about.

Q. Well, does the volume of water, is it larger during the months of March—or was it in 1904 during the months of March and April than it was in February of that year?

Mr. HUNTINGTON.—Objected to as leading.

A. I think it was. [732—676]

Q. Then, if the volume of water was larger what effect would that have on the depth of water in the creek, whether greater or less?

A. It would be greater.

Q. The depth of the water in the creek would therefore run from about how many feet, would you say, in February up to how many feet in March?

Mr. HUNTINGTON.—Objected to as incompetent.

Q. Just give your best recollection.

A. Well, sometimes those floods come more in one month one year than they do the same month in other years. And one time there might be a big flood of water in February and it might be in January the next and in March another year, so they would vary in that way.

Q. I will ask you, as a general thing, however, is there not—doesn't the creek rise gradually from the time it begins to rise and keep on in a gradual

(Testimony of Emory Cole.)

rise then there may be a receding and gradual fall off?

MR. HUNTINGTON.—Objected to as very leading.

A. Yes, sir, in each flood incident it does, but we may have more than one period of floods.

Q. But I want to know whether the water comes down in a great big bank of water or gradually rises?

MR. HUNTINGTON.—Objected to as leading.

A. It gradually rises. [733—677]

Q. Now, the water that passes under your bridge, is it used by lower riparian owners down the valley in ditches?

MR. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Do you know the number of ditches that take water out below there?

A. I know of a good many ditches.

Q. How many do you know of say that takes water out before it gets to Section 5, Township 16 South, Range 43 East? Well, you know where Mr. Gray's ranch is?

A. Yes, sir.

Q. Now, the number of ditches that are taken out before the creek gets along to Mr. Gray's ranch, how many are there?

A. Three, I believe, is about the number.

Q. Now, going back to the other question which I asked you and which you have not made an answer yet, and counsel objected to it, state to me what would be the average height of the water as the freshets begin to arrive and say during the first ten

(Testimony of Emory Cole.)

or fifteen days.

Mr. HUNTINGTON.—Objected to as incompetent.

Q. Just give me your best opinion or recollection as to the depth of the water after the freshets begin to arrive and during the first ten or fifteen days of them.

A. It would be six or seven feet; somewhere along there.

Q. That would be the average height?

A. Yes, sir.

Q. Now, the creek continuing to rise what would be its depth [734—678] during the next twenty days?

Mr. HUNTINGTON.—Objected to as incompetent.

A. Twelve or fourteen feet is possible.

Q. 12 or 14 feet in depth? A. Yes, sir.

Q. Now, after the first ten or fifteen days does the creek generally continue to rise?

Mr. HUNTINGTON.—Objected to as incompetent.

Q. You may state whether or not it does.

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. What is the width of the creek there at the bridge? A. 140 feet.

Q. I will state to you, Mr. Huntington, that if you will let me see the table you have been talking about, and if it is prepared in such a manner as I understand, I will then in all probability agree with

(Testimony of Emory Cole.)

you to admit it in evidence, though I would have to see it first. [735—679]

Re-recross-examination by Mr. HUNTINGTON.

Q. The measurements made in 1905 showed a very much less flow of water in the creek than in 1904, didn't it? A. I think it did; yes, sir.

Q. Could you give us the total of the acre-feet for 1905? A. I have not seen it estimated.

Q. Now, as a matter of fact, the flow of the creek varies very much from year to year, both in amount and in amount during any particular month?

A. Yes, sir, I think it does.

Q. And the length of the flow varies very much?

A. Yes, sir.

Q. In some seasons the snow water runs off very quickly and in other seasons it holds on until late in the season? A. Yes, sir.

Q. In some seasons the amount of water overflows a considerable amount of the valley along the creek? A. Yes, sir.

Q. And other seasons it is confined almost entirely to the creek-bed? A. Yes, sir.

Q. Did you make measurements there in January, February, March and April, or was the figures concerning which you have testified, were they the result of estimates as shown by the record there?

A. Well, the mode of measuring was similar through those estimated times there any more than it was did with a string, I think, instead of a chain. By a cord instead of a [736—680] chain. So far

(Testimony of Emory Cole.)

as I could see I couldn't see any reason why it should be very much different.

Mr. HUNTINGTON.—Mr. Cole, I will call your attention to the report of the Department of the United States Geological Survey for the year 1905, published in the year 1906, by the Union Printing Office. I will call your attention to the table on page 146 purporting to be the estimated monthly discharge of Willow Creek near Dell, Oregon, for 1905. This estimate of this discharge is based upon measurements made as in 1904, as I understand you?

A. I think they are. I know the parties mentioned here.

Q. You, Mr. Torkelson and Mr. E. N. Smith?

A. Yes, sir.

Q. They were there representing the Government, were they, in making the measurements?

A. Yes, sir.

Q. The total discharge as shown by this report from January to November, both inclusive, of that year, and not including the month of December, was 18,450 acre-feet as shown by this estimate, isn't it?

Mr. HART.—Objected to as incompetent, immaterial and irrelevant, and as not the best evidence, and I will ask you to let me look at it.

Q. I will ask the witness another question while waiting. The same men were there representing the Government making the measurements for the figures of 1904 as made the measurements for the figures of 1905?

A. I don't think the same ones; they changed

(Testimony of Emory Cole.)

several times during the time they were operating there. [737—681]

Q. But in each case they were men representing the Government?

A. Supposed to be; yes, sir.

Mr. HART.—Counsel for defendant states that he does not have a thorough understanding of these figures, but since they seem in books published by the United States the defendant is willing to submit all of the figures in the book issued in 1904 and all the figures issued in the book issued in 1905; defendant's counsel produces book of 1904 and complainant's counsel produces book of 1905. Whilst defendant's counsel regards many of the figures as unintelligible, yet we are willing to admit all the pages in the book of 1904 bearing upon Willow Creek, including all the figures in evidence, for whatsoever they may be worth; that is, the figures appearing under the head, "Willow Creek near Dell, Oregon," as commencing on page 216 and extending over to the bottom of page 218 of the report for the year 1904 as produced by counsel for the defendant. And, all of the figures contained in the report for the year 1905 brought in by complainant's counsel and commencing under the heading "Willow Creek near Dell, Oregon" and commencing near the bottom of page 143 and extending to the words "Powder River near Baker City, Oregon," found on the middle of page 148.

Mr. HUNTINGTON.—It is stipulated that each counsel will send for duplicate reports and submit

(Testimony of Leonard Cole.)

them with the record in this case.

Witness excused. [738—682]

At the hour of 12:10 o'clock P. M., July 27th, 1909,
adjourned until 1:30 o'clock P. M. to-day.

At the hour of 1:30 o'clock P. M., July 27th, 1909,
met pursuant to adjournment as above. Present:
Same as before.

[Testimony of Leonard Cole, for Defendant.]

LEONARD COLE, a witness produced on behalf
of the defendant, after being duly sworn, testified as
follows:

(Examined by Mr. HART.)

Q. State your name? A. Leonard Cole.

Q. How long—are you familiar with the lands up
and down the valley of Willow Creek?

A. I am.

Q. And with the gorge lands on beyond the place
of your brother Emory Cole? A. I am.

Q. How long have you lived in this country?

A. I have been in this country about forty-one
years.

Q. What age man are you?

A. Fifty-one years old. [739—683]

Q. How far up Willow Creek above the dam is
it before you get to the table lands on the next kind
of little plateau up there?

A. Up the mountain?

Q. Yes, sir; up the creek where there is farm and
irrigated land up above?

A. There is not any irrigated land before you get
to Beers' ranch.

(Testimony of Leonard Cole.)

Q. Well, how far is Beers' ranch?

A. Oh, it is four or five miles.

Q. Now, then, are there irrigated lands in that vicinity of Beers' ranch?

A. Beers' ranch is irrigated.

Q. Part of the waters of Willow Creek irrigates that?

A. Yes, sir; he has a dam out of Willow Creek and takes water out of Willow Creek in the canyon and takes water onto his place.

Q. And are there other lands also irrigated?

A. There is lands above Beers'?

Q. How far up above?

A. It is about two and a half miles to the lower end of Rose's place—from the head of his ditch to the lower end of Rose's I think. Rose has 480 acres of land there he irrigates from Willow Creek. Then the land that joins his is irrigated by *ditch is Anderson*; he has 320 acres of land.

Q. I am not particular, Mr. Cole, to go into specifically who has land and who has not that is irrigated, I simply want to know if there are tracts of land up there that either are irrigated or are capable of being irrigated by the waters of Willow Creek?

A. There is two sections of land between Beers and Rose that are not irrigated. [740—684]

Q. Are they capable of being irrigated?

A. They are fourteen and fifteen.

Q. Still on beyond Rose are there other places still farther?

A. There are a few places farther along that is

(Testimony of Leonard Cole.)

not irrigated and that could be irrigated if there was sufficient water to irrigate. If the water wasn't taken up by prior appropriators there are thousands of acres of desert land in that country.

Q. Are you acquainted with Mr. Brogan?

A. Yes, sir.

Q. Do you recall the time when he first came down and first began to examine the properties here in the valley with the idea of organizing the present defendant company?

A. Why, sometime in 1907, I think.

Q. You think it was some time in 1907?

A. Yes, sir.

Q. Do you recall the time when the present defendant company was organized?

Mr. HUNTINGTON.—Objected to as not the best evidence.

Mr. HART.—No, I know it is not. We have already put in a copy of the Articles of Incorporation—certified copy. You put them in down in the—Can they be considered as offered in evidence? I have not the copy.

Mr. HUNTINGTON.—We will stipulate that they be considered as in evidence, the articles of incorporation which were filed and which were used on the hearing of the application for temporary injunction—that they be considered in evidence in this case.

Q. Now, the Articles show that the company was organized either [741—685] in the last of March or the first one or two days of April, 1908. Do you recall about the time of its organization?

(Testimony of Leonard Cole.)

A. I do.

Q. Previous to that time had Mr. Brogan, or had you at his instance, expended any money or done any work on the construction of the dam?

Mr. HUNTINGTON.—Objected to as immaterial.

A. We had been working and spending money for about a year previous to that—preliminary examination and surveying.

Q. Whatever work and labor and expenses occurred that had been occasioned they were afterwards—you may state whether or not they were afterwards a part of the expenses assumed by the Willow River Land & Irrigation Company?

A. They were paid by the Willow River Land & Irrigation Company.

Q. Have you been connected with the Willow River Land & Irrigation Company since its organization? A. Yes, sir.

Q. In what capacity?

A. I have been acting Superintendent of the Willow River Land & Irrigation Company.

Q. Do you know where they are constructing this dam in the Willow River canyon up there?

A. Yes, sir.

Q. Have you had anything to do with the construction of the dam?

A. Yes, sir, it has been constructed under my supervision all the time until Mr. Hugh O'Donnell came.

Q. Since the time Mr. Hugh O'Donnell was in charge of the active work have you had occasion to

(Testimony of Leonard Cole.)

visit and go over the [742—686] work performed by him or examine it? A. I have.

Q. Do you recall last May receiving a letter from the Willow River Land & Irrigation Company making a statement to you pertaining to the occupancy of Section 27 in the vicinity of this dam?

A. I received a letter from the Eastern Oregon Land Company.

Q. I meant the Eastern Oregon Land Company.

A. Yes, sir.

Q. Did you, or do you recall the receipt of another letter in June from the same company about the same matter?

A. Yes, sir, I remember of getting one sometime in June. I think I did.

Q. Did you also have occasion to see any letters which Mr. Brogan may have received from the same company in May and June? A. Yes, sir.

Q. You have been in attendance here as a witness in this case? A. Yes, sir.

Q. Are those the letters of which copies were read into the record some few days ago?

Mr. HUNTINGTON.—We concede they were.

WITNESS.—As near as I can remember they were.

Q. Up to that time had there been any protest of any kind—at the time of the receipt of those two letters had there been any protest of any kind or notice of any kind served on either yourself or upon Mr. Brogan so far as you know pertaining to him?

(Testimony of Leonard Cole.)

Mr. HUNTINGTON.—Objected to as immaterial.

[743—687]

A. No, sir, I never did.

Q. Was there ever any objection by anyone previous to then?

Mr. HUNTINGTON.—Objected to as immaterial.

A. No, sir, there never was.

Q. Now, up to that time, about when you received that first letter in May, had the Willow River Land & Irrigation Company expended and paid out money in the prosecution of its work and in the construction of this dam? A. Yes, sir.

Q. I wish you would state as near as you can remember the amount of money that had been paid out and expended at that time that you know of.

Mr. HUNTINGTON.—The complainant objects to all testimony along this line and all testimony of this witness concerning these matters or relating in any way to any alleged estoppel on the part of the defendant or which is offered for the purpose of attempting to prove an estoppel as incompetent, irrelevant and immaterial and foreign to the issues of this case. May this objection apply?

Mr. HART.—Yes, sir.

Mr. HUNTINGTON.—This objection to apply to all testimony on this line.

A. I think there was about \$27,000.00 expended at that time I received these notices.

Q. Had any work—

WITNESS.—That is in preliminary surveying and in both places [744—688] we were working.

(Testimony of Leonard Cole.)

Q. Had any work at that time been done on the construction of the dam or reservoir?

A. Yes, sir, at that time work had been done on the dam and reservoir.

Q. How many men had been employed in that work?

A. We had from five to six to fifteen men that came and went.

Q. Through how many months had those men been working?

A. Well, I have had men there for a year before that time.

Q. Working on the reservoir?

A. Not exactly, but in making surveys.

Q. I am speaking of the reservoirs previous to May, 1908, how many men had you had at work at different times on the reservoir prior to the receipt of that notice?

A. Well, I had from five to fifteen men for two months previous to that time in operation there.

Q. Do you recall the place where the office of the defendant company was first opened in the Town of Vale?

A. It was opened over the old First Bank of Vale in the stone building.

Q. About what month was it opened there?

A. My recollection is it was opened there some time in March.

Q. 1908? A. Yes, sir.

Q. Are you acquainted with Mr. Clagett?

A. Yes, sir.

(Testimony of Leonard Cole.)

Q. What position does he occupy here, if any, in reference to the Eastern Oregon Land Company, the complainant? A. He was their agent.

Q. Do you know whether or not he had an office during the months of March, April and May or where it was located? [745—689]

A. He had an office that was located on the same floor in the same building.

Q. You mean the complainant company had an office there?

A. Yes, sir, the complainant company had an office over the First Bank of Vale.

Mr. HUNTINGTON.—We will concede Mr. Claggett's office as in the same building at the time they opened their office and that it adjoined the office of this company and so continued up to the 15th day of May, to save time.

Q. Now, during the time that the complainant company's office and the defendant company's office was in the same building from where was the work of the defendant company carried on, excluding the actual physical work being done on the dam?

A. The work of the defendant company was carried on in the defendant company's office in the First Bank of Vale's building.

Q. Can you state whether or not Mr. Claggett knew during the months of April and May until he left there at any rate and previous to the receipt of that letter by you of the work which the defendant company was doing, either specifically or in a general way?

(Testimony of Leonard Cole.)

A. Mr. Clagett knew in 1907 that we were contemplating on putting a reservoir in there and Mr. Colonel Mann talked in his presence. He was acquainted with Mr. Clagett, or with his people anyway.

Q. Did Mr. Clagett also know in April and May and previous to the time of the writing of that note that you and the present company, or, rather, the present company was engaged in constructing a reservoir there? [746—690] A. Yes, sir.

Q. Previous to the receipt by you of that letter did he make—was any objection made or formulated to the work which you were doing?

A. No, I don't think there was.

Q. Now, did he know that it was the purpose and intent of this company to construct a reservoir to impound the flood waters or spring waters? State whether or not he did know.

Mr. HUNTINGTON.—Objected to as leading.

A. He did know.

Q. Was there ever a protest made by the complainant company previous to the bringing of this suit or an objection made by the complainant company previous to the bringing of this suit of the fact that the overflow or flood waters was to be impounded and stored in this reservoir?

Mr. HUNTINGTON.—Objected to as leading.

A. No, sir; never any objection made to my having the pieces of property. If they did I told them to get out of there.

Q. You mean to say "I told them" or "I would

(Testimony of Leonard Cole.)

have told them''?

A. Well, I have had people put stock in there and I run them out because I didn't allow them to stay there on account of the ditches.

Q. Did the Eastern Oregon Land Company?

A. They never told me anything about it in any way, shape or form until I received the notice.

Q. Did they ever at any time make any objection to the storing of the spring water, claiming that the storing would injure [747—691] their riparian lands?

Mr. HUNTINGTON.—Objected to as leading.

A. No, sir.

Q. Did you ever receive any notice from them at any time except those which have been read into the record?

A. No, sir; I never heard of any.

Q. From May and April up to the bringing of this suit some time in October, 1908—I think that is the time—did you have occasion to see Mr. Clagett frequently?

A. Every few days I saw him.

Q. Where did you see him?

A. I met him every day or two.

Q. Did he know that you were the Superintendent in charge of the construction of this company?

A. He did.

Q. During that time was any protest made or exception taken to the intent of the company to store flood waters, and if so what?

Mr. HUNTINGTON.—Objected to as leading.

A. None.

(Testimony of Leonard Cole.)

Q. There was none. When was it that you first heard, or when was it the defendant company first heard or learned that the complainant company was claiming that some of its lands would not be overflowed if the dam was constructed?

A. I never knew anything about that until I saw their complaint.

Q. Until you found it in their complaint?

A. Yes, sir. [748—692]

Q. The complaint filed in this suit?

A. Yes, sir.

Q. When was it you or the company first learned that the complainant company was claiming that it would be damaged as riparian owners if the water was not permitted to flow by them?

A. Why, when the papers were served on a member of the company was the first time they were handed to me.

Q. Now, after the receipt by you and Mr. Brogan of those two letters dated in May and in June, 1908, was additional sums of money expended on the construction of the reservoir?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. About how much was additionally expended up to the time of the bringing of this suit?

A. At the time this suit was brought we had spent something like \$50,000.00 on the project altogether.

Q. Since the bringing of the suit has the work gone on in the construction of the reservoir?

A. Yes, sir.

(Testimony of Leonard Cole.)

Q. Do you recall the amount of money that has been expended in the building of the reservoir up to the present time as near as you can?

A. I think there has been about \$80,000.00 spent.

Q. Now, what condition—how far or how much constructed is the reservoir—what is the extent of its present construction?

A. Why, we have a trunk to carry the water in.

Q. A trunk to carry the water in? Do you mean to let the water out of the reservoir? [749—693]

Mr. HUNTINGTON.—That is rather leading.

Mr. HART.—I don't know whether he meant in or out.

WITNESS.—It is to carry the water from the reservoir back to the mouth of the ditch.

Q. What is the length of this trunk?

A. About four hundred feet long.

Q. What is the height of it?

A. It is four feet by about five and a half.

Q. What is it built of?

A. Cement and rock. It is built from five feet on the bedrock up above the natural ground.

Q. How deep down below the bed of the creek was the base of the trunk sunk?

A. Some places 25 or 26 feet deep from the surface of the ground. We built it right next to the side of the hill, as I thought we could get to bedrock quicker there than out in the middle of the creek was my idea for building it to one side.

Q. About how deep down does the bed of the trunk extend below what was formerly the surface of

(Testimony of Leonard Cole.)

the ground? A. Well, it varies in depth.

Q. How much?

A. From one foot to twenty-six feet.

Q. That is, you say, all solid cement?

A. Cement and stone. The cement is three feet thick on each side and plastered on the inside with cement two to one to make smooth plaster on the inside and the top is cement over the arch—

Q. What other work was done in the construction of the dam?

A. —and the bottom is made with cement. And there is—

Mr. HUNTINGTON.—You don't mean to say the bottom of the dam is made with cement? [750—694]

A. The bottom of the trunk.

Q. Have you done any other cement work there besides the trunk? A. We built a cement core.

Q. From where to where did you build the core?

A. From wall rock to wall rock.

Q. From one side of the creek to the other?

A. Yes, sir, solid bedrock. It is in the bedrock generally about five feet in the creek.

Q. How deep down to bedrock—how deep down did you have to go before you reached bedrock in the bottom of the creek?

A. There is one place from the top surface is thirty-seven feet.

Q. What is the length of this core?

A. Two hundred and seventy feet.

Q. 270 or 370? A. 270.

(Testimony of Leonard Cole.)

Q. About how high is it? You say one place it is—that place you spoke of it being 37 feet, how high would it be at that place where you made the core?

A. Well, it would be something like forty feet because it is built a little higher than the natural ground. We took this dirt and plowed and scraped the earth out as far as we could plow and scrape it out with teams.

Q. You may state whether or not there was difficulty in getting to bedrock and tying the core to bedrock.

Mr. HUNTINGTON.—Objected to as leading.

A. We had quite a hard time handling the bedrock and, of course, we settled two or three before we could get them to work and worked two at a time.

[751—695]

Q. Were there difficulties about the size?

A. Yes, sir.

Q. How thick is that core?

A. Three feet thick on the bottom.

Q. And how thick at the top?

A. Right at the very top I think it is about eighteen inches. Mr. O'Donnell kind of narrowed it. When they got to the top of the ground they narrowed it in. I didn't measure it since Mr. O'Donnell finished the last part.

Q. Where does this core set in regard to the center of the dam?

A. The core sets very near the center of the dam.

Q. The other portions of the dam are constructed and being constructed of what?

(Testimony of Leonard Cole.)

A. It is composed of rock and earth.

Q. About how high has the dam been constructed up to the present time?

A. Well, I haven't been there for two or three weeks.

Q. Well, at the time you saw it just give me your estimate of it there.

A. Well, in some places I think it was fifteen feet high.

Q. When were you there last?

A. I haven't been there for two or three weeks; I don't remember the exact date.

Q. Were there men working on the dam at that time?

A. There was 25 men working on the dam at that time.

Q. Now, are you familiar with the work in the nature of a development that the defendant company has been carrying on on parts or portions of the lands which it has acquired?

Mr. HUNTINGTON.—Objected to as immaterial for any purpose [752—696] and wholly foreign to the issues in this case and for the reasons already urged.

A. Yes, sir.

Q. About how many hundreds of acres of fruit trees have been planted in the valley since April, 1908, when the company became active the first of April or last of March?

Mr. HUNTINGTON.—Our objection goes to all of this testimony.

(Testimony of Leonard Cole.)

Mr. HART.—Yes, sir.

Q. If you don't know definitely just your best remembrance?

A. Between six to eight hundred acres.

Q. About how many different fruit trees have been planted? A. Different varieties?

Q. No, the number of trees all told? You don't know definitely the number, do you? Give me your best judgment.

A. No, but there has been several thousand trees planted there.

Q. Do you know whether additional land has been cleared and put in shape for the reception of trees?

A. Yes, sir; there has been a good many acres put in shape; some five or six hundred acres additional land and some I know of are being worked on all the time.

Q. And will be planted in fruit trees?

A. I know of about 800 acres more trees they are contemplating planting.

Q. They will be planted next spring?

A. Either this fall or next spring.

Q. The land where these trees have been planted and where the ground has been prepared, is that under the system of irrigation devised by this company? [753—697]

A. Yes, sir. This company's water is irrigating the trees to-day, all of them.

Q. Now, Mr. Cole, did you ever own any mining claims in the canyon? A. Yes, sir.

Q. Where were those mining claims in regard to

(Testimony of Leonard Cole.)

the location of the dam site?

A. Well, they run about a mile below the dam site and about two miles above the dam site.

Mr. HUNTINGTON.—Objected to as incompetent and not the best evidence. I would like to see the copies of the claims.

Mr. HART.—I haven't got that done yet. I will offer all of those in evidence so you can see them.

WITNESS.—They run over 34, through 27, 28, 21, 17 and 20 (Sections).

Q. Well, having numbered them that way you can go back to the other method. How far below the dam site do they run? A. I think about a mile.

Q. And how far above the dam site?

A. About two miles.

Q. Do they run up into Section 21?

A. They run through Section 21.

Mr. HUNTINGTON.—Objected to as leading.

Q. Are they in parts and portions of what other sections?

A. They run through 20, into 34—in going up the creek they run through them, start in 34 then run through 27, 28, 21, in 17 and 20 we have got ground.

Q. How long have you been familiar with that property up there [754—698] as mining property?

A. I have been acquainted with that property as mining property ever since 1869.

Q. Do you know what has been its general reputation and generally regarded by the community as to

(Testimony of Leonard Cole.)

whether or not it was mining property since and before 1869?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial and not the best evidence.

A. It has always been considered mining property by mining men. Experts have made reports—

Mr. HUNTINGTON.—Objected to as hearsay.

Q. Was it ever experted by mining engineers?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial and not the best evidence.

A. I have had four expert engineers examine this property, and I have got written reports on it.

Q. Do you know whether those reports—I am not asking you what they are—do you know whether those reports are favorable as to whether the ground contains gold in paying quantities or not?

Mr. HUNTINGTON.—Objected to as incompetent and not the best evidence, hearsay and calling for secondary evidence. [755—699]

A. They are all favorable reports.

Q. Now, from your own knowledge, does that ground up and down the creek in Sections 27, 21 and 28 carry gold?

Mr. HUNTINGTON.—Objected to as leading.

A. It carries gold.

Q. When did you locate on those claims?

A. I located on those claims in 1894.

Q. Who was with you in the ownership of them?

A. When I first located them it was Mr. Insenhof, Mr. Eddy and myself.

Q. And afterwards who acquired the interests of

(Testimony of Leonard Cole.)

the various parties?

A. Mr. Eddy sold his interest to D. J. McCarty. He sold to H. Duffy.

Q. Who finally ended up by owning the interests?

A. J. L. Cole, John Chinnners, J. W. Insenhofer.

Q. Who was owning the claims or were these claims ever transferred to the present defendant company?

A. They are all transferred to the Willow River Land & Irrigation Company.

Q. Did that carry the title of all the persons who had interest in them?

Mr. HUNTINGTON.—Objected to as not the best evidence and asking for the conclusion of the witness.

Mr. HART.—I will withdraw that then.

Q. Who made deeds of the property to the Willow River Land & Irrigation Company? [756—700]

A. I had the deeds made.

Mr. HUNTINGTON.—I want all my general objections to go to all this testimony.

WITNESS.—I had the power of attorney given for to handle this property all the time.

Q. From whom?

A. From the owners of the property.

Q. Well, who did the various people deed to?

A. To the Willow River Land & Irrigation Company; that is where it landed.

Q. You mean where the title landed?

A. That is where the title landed, the Willow River Land & Irrigation Company.

Q. Does that have reference to what properties?

(Testimony of Leonard Cole.)

A. It has reference to 280 acres of placer mining—

Q. In what sections?

A. In Sections 34, 27, 28, 21, 17 and 20.

Q. Now, when were those deeds delivered?

A. Oh, those deeds were delivered—why, I couldn't say just what month either.

Q. In reference to the time when the corporation was organized, in March or April?

A. About that time or a few days afterwards.

Q. 1908? A. Yes, sir.

Q. Previous to the delivery of those deeds up until 1905 or '05 when the ground was located, who was in possession of the property, if anyone?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial. [757—701]

WITNESS.—He means 1894, I suppose.

Q. 1894 up to the date of 1908 when you delivered the deeds to the defendant company who was in possession?

A. Mr. Insenhofer and myself has had continuous possession of that ground since 1894 up to the time we turned it over to the Willow River Land & Irrigation Company.

Q. You may state the kind of possession you had.

A. We had work there every year and water run through the ditches every year, and had men engaged in mining there every year.

Q. You may state whether the possession which you had was a secret or hidden possession or how.

A. It was an open, notorious possession.

(Testimony of Leonard Cole.)

Q. Was there any difference in the way in which you held possession of that property than the way a man ordinarily holds possession of that class of real estate?

Mr. HUNTINGTON.—Objected to as leading; calling for the conclusion of the witness and incompetent and not the best evidence.

A. I don't think there was.

Q. You may state whether or not the possession which you held was founded under a claim of right on the part of you people.

Mr. HUNTINGTON.—Objected to as incompetent and not the best evidence.

A. I thought I was holding it under the mining rights and knew I was according to the law of the United States.

Q. Then you were holding them under the mining claim act of [758—702] the United States?

A. Yes, sir.

Q. What can you say about the work done annually as to whether or not it complied with the requirements of law?

Mr. HUNTINGTON.—Objected to as incompetent, calling for the conclusion of the witness, not the best evidence and not the proper way to prove that fact.

A. I filled every requirement of the law, in regard to the mining law.

Mr. HUNTINGTON.—Move to strike out as not responsive, incompetent and not the best evidence.

Q. How many—you may state the extent of the

(Testimony of Leonard Cole.)

work in dollars which was performed yearly on each of the claims or on the aggregate of the claims joined together? A. 1895 I spent \$4,400.00.

Q. I don't want that, I just simply ask you—I will ask you in another way. Was there as much as a hundred dollars a year spent for each claim in work and development yearly upon the claims?

Mr. HUNTINGTON.—Objected to as leading.

A. Well, there never was a year there wasn't \$200.00 spent on every claim.

Q. Well, now, did you do any mining work yourself there at times?

A. Well, I have superintended. I have held a giant for a [759—703] a few days and worked at it in different ways.

Q. Can you say as to where mining work was done with reference to the dam, whether above or below or on both sides of it or how?

A. Mining was done both on the upper end of the claim up and down the creek on both sides and below the dam and on both sides of the creek below the dam, and right at the dam where the dam stands now.

Q. Was there any work done on Section 21?

A. Yes, sir, I mined about three acres of ground off Section 21.

Q. Was there work done on Section 27?

A. Yes, sir, there was work done on Section 27.

Q. Do you know the general condition of the way—the way in which the water runs in Willow Creek?

A. Yes, sir.

Q. During certain seasons of the year does the

(Testimony of Leonard Cole.)

water, is the water more or less?

A. It varies very much.

Q. When is the freshet season of the year?

A. Along in February generally.

Q. The freshet season is generally in February?

A. Sometimes it comes later.

Q. When is the dry season of the year?

A. The dry season of the year is in July, August and commences falling sometimes earlier than that.

Q. When you commenced the construction of this reservoir and before you may state if you know was it generally known to the citizens and inhabitants of Willow Creek as to the purpose of the reservoir? More particularly pertaining to its catching and holding flood waters? [760—704]

Mr. HUNTINGTON.—Objected to as leading, incompetent, immaterial.

A. It was generally known it seemed to me like by everybody. They seemed to find it out and they were all talking about it. I don't know how they found it out.

Q. There was no effort to keep it secret on the part of the company?

Mr. HUNTINGTON.—Objected to as leading, incompetent and immaterial.

A. No, sir.

Q. You may state whether or not it was a notorious fact or was not a notorious fact or information amongst the inhabitants of Willow Creek valley that the purpose of the reservoir was to catch and hold flood or early spring waters.

(Testimony of Leonard Cole.)

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. I think everybody in that part of the country has talked more or less about it.

Q. You may state whether or not that applies to people living in the Town of Vale.

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. The Vale people seemed to be familiar with the subject and was conversing about it upon the streets nearly every time I meet them. [761—705]

Q. Was it known notoriously as you have indicated that such was the purpose and intent pertaining to the reservoir during the months of April and May, 1908?

Mr. HUNTINGTON.—Objected to as leading and incompetent.

A. Yes, sir.

Q. Now, I wish you would describe how the flood waters come down Willow Creek as to their volume when they first commence? When they first commence do they increase and decrease and explain it?

A. Well, I have crossed the creek in the evening and go back the next day at eight or nine o'clock and the bridge I went over was gone and the stream running there ten or fifteen feet deep when the night before there wasn't but little water. There had been a violent flood come down that night. It would run in that style and then it would decrease a little and in a week or so it would be gone. These floods generally come in February and March when the ground

(Testimony of Leonard Cole.)

is frozen and it runs very freely on top of the ground.

Q. What is the condition of the ground generally in February when the floods first come?

A. It is generally frozen from two to six inches deep; maybe a foot deep on the ground. I have seen it frozen a foot and a half in February.

Q. Now, do the flood waters ever rise more gradually?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Explain that. [762—706]

A. There are never two years alike. One comes in a violent flood season and one goes off gradually. And, if there is not a very big flood the water goes into the ground and saturates the ground where it lays. And sometimes it comes a warm wind or rain and the water comes down by tons and it all goes out of the country and doesn't do no good and goes into the sea, I suppose.

Q. Is there any benefit to the land or anyone, speaking in a general way, from the waters falling or flooding in February?

Mr. HUNTINGTON.—Objected to as leading.

Q. The first flood waters?

A. I don't think they are ever a benefit to anybody; on the other hand, they are quite a detriment because they carry slime down from the mines and into the creeks and damages it sometimes so that you cannot cut the hay the next year at all.

Q. When the ground is frozen when the flood waters come down, the first of them, you may explain

(Testimony of Leonard Cole.)

how they could benefit anyone if it is a benefit?

A. It could not benefit anyone, the actual flood, but sometimes when those heavy snows come in the mountains and the flood runs all over the country, if it happened to strike a thawed place in the mountains where the gravel allows it to penetrate down to the low land in the summer season, it would penetrate back and would take a long time to find its way.

Q. I am speaking about the soil lower down in the valley, these violent floods?

A. It is a detriment to all land on the low ground. I don't think it is a benefit to anyone's lands. [763—707]

Q. Do you know what has been the custom of persons having low land which they were working upon, as to whether or not they permitted it to become overflowed? A. They don't if they can help it.

Q. Have you seen or known of persons preventing or attempting to prevent their land from being overflowed?

a. Mr. Grimes has spent a good deal of money taking water off his land so he could put it into alfalfa and cultivation to raise merchantable hay to feed his stock on. I had occasion to seel 248 tons of hay at the Grimes ranch at sheriff's sale and because of its being wire-grass and fox-tail and because of there being too much water on it it only brought \$84.50.

Mr. HUNTINGTON.—Move to strike out all the answer of the witness with regard to his selling hay on the Grimes ranch as not responsive to the ques-

(Testimony of Leonard Cole.)

tion, incompetent, irrelevant and wholly foreign to the issues in this case.

Q. Now, explain how a drain ditch can prevent the low land from being flooded.

A. The drain ditch is built lower than the low land and it will follow it along instead of running over the top of the ground.

Q. Do the drain ditches as a usual and customary thing prevent the land from being overflowed where they are constructed for that purpose?

Mr. HUNTINGTON.—Objected to as leading.
[764—708]

A. They always drain the water off.

Q. I want to know whether it is to drain the land or to prevent its being overflowed?

Mr. HUNTINGTON.—Objected to as leading.

A. It is to drain the land and prevent its being overflowed both.

Q. Do they use any other form of obstructions besides these ditches?

A. In a great many places they build levees. I built levees on Section 19 and backed the water off the land another way.

Q. What class of land, as to whether it is low or high that is usually flooded when any of the land is flooded?

A. Well, a flood might come on any land, because—

Q. The usual overflow?

A. The overflow is all low ground.

Q. The overflow is all on low ground?

(Testimony of Leonard Cole.)

A. Yes, sir.

Q. The place where you speak of levees being built to prevent overflow, or where you speak of ditches being built to carry off the overflow and prevent the same, what kind of ground was that as to its elevation?

A. It was low ground.

Q. Have you seen the character of vegetation growing upon the low ground which was flooded before the construction of the dikes, levees or these escape drains—ditches?

A. The grass is generally—

Q. I didn't ask what it was—have you seen it?

A. I have seen it.

Q. What would be the class of vegetation when subject to overflow [765—709] and not prevented by the dikes and drain ditches?

A. Principally wire-grass and fox-tail.

Q. After the construction of these ditches and levees what would be the character of the vegetation?

A. It changes the character of that water course and you get a better grass, more valuable and more nutritive.

Q. Will such land when the flood water is kept off raise other crops that could not have been raised with flood water on them?

A. If they keep the water off they could raise alfalfa.

Q. What can you say as to the value of alfalfa land as compared to the value of land which is only capable of producing wild grass and salt grass and wire-grass?

(Testimony of Leonard Cole.)

A. One acre of alfalfa is worth about forty of that and produce about that much more money.

Q. It is many times more valuable?

A. Yes, sir.

Q. Do you know whether or not the company—the defendant company has located a storage reservoir site farther up Willow Creek in the higher table lands?

A. They have located a storage reservoir above the one they are working on now, above the Beers ranch.

Q. They have located a reservoir site above the Beers ranch?

A. Yes, sir. They are working on it in construction work at the present time.

Q. Do you know whether or not the defendant company is engaged in working upon that?

A. Yes, sir, they had a camp there ever since before I come—cook stove and—

Q. When was this located?

A. I can't say the date. [766—710]

Q. Well, about how many days ago, or months?

A. Well, we commenced surveying there sometime last month.

Q. Do you know the purpose of the dam—what the purpose of the dam is for?

A. Yes, sir; it is for reservoir purposes.

Q. For storage reservoir purposes?

A. Yes, sir; for storage reservoir purposes.

Q. How many acre-feet will that dam hold, estimated?

(Testimony of Leonard Cole.)

Mr. HUNTINGTON.—Objected to as incompetent and immaterial.

A. Hold a little over forty and 50,000 acre-feet.

Q. Between forty and fifty thousand acre-feet?

A. Yes, sir.

Q. You may state what the plan is of the company in getting the water down from this storage reservoir into the reservoir at the dam site located in the gorge in the vicinity of Sections 28 or 27 or in there.

Mr. HUNTINGTON.—Objected to as incompetent, and all of the testimony relating to this matter is objected to as incompetent and irrelevant and foreign to the issues in this case and for the further reason that there is no evidence of the defendant company having any right to the use of water at that point or any other point on the creek, or the right to divert from the creek any water at that point or any other, and we ask to have our objection go to all of this testimony.

Q. Answer the question.

A. They will run the water in the creek channel.

[767—711]

Q. You mean by that that they will simply let the water out of the reservoir into the creek channel?

A. Yes, sir.

Q. By doing that the water will go to what place?

A. It will go down on Section 28 where the reservoir is.

Q. Now, Mr. Cole, are you familiar with the various creeks that flow into and form a confluence with Willow Creek below the location of the dam site?

(Testimony of Leonard Cole.)

A. Yes, sir; I know them.

Q. I wish you would give us the names of the creeks on the right-hand side of Willow Creek going up—the right-hand side or east side going up stream.

A. The principal creek is Dry Gulch, and the Road Gulch that runs up the road to go to Huntington, and Stone Quarry Gulch.

Q. On the right-hand side going up?

A. Yes, sir. And the next creek is a little sand creek that comes down there to Dell Postoffice and the next creek is Fox Creek, and the next creek is Baker Creek, and the next creek is Cottonwood Creek that runs in below the reservoir.

Q. Well, is there a Hodge Creek up there, or Hodge's Canyon, or something like that?

A. Fox Creek is called Fox Canyon generally.

Q. Rogue Canyon?

A. Yes, sir; that is on the other side of the creek, but there is one on the other side of the creek.

Q. Do these various creeks on the east side carry water in them?

A. They all carry some water every year.

Q. You may mention the names of the creeks on the west side or left-hand side of Willow Creek going up. [768—712]

A. The first creek to speak of is a lot of little draws that come in is Current Creek, Little Willow Creek, Sheep Corral Gulch, Turner Gulch, Camp (or Gum) Creek, one prong of Black Creek; and then, as it goes on up, Pole Creek and Road Canyon and Kindall's Spring Creek. It has never been mentioned,

(Testimony of Leonard Cole.)

the name of the creek, in this case.

Q. Well, excluding Pole Creek, do any of these creeks you have mentioned on the left-hand side flow throughout the continuous year?

A. There is some water in them continuous years in various places about five or six of them.

Q. Flowing continuously?

A. Flowing continuously. Road Canyon flows continuously, and Kindall's Spring flows continuously, and Camp Creek; Sheep Corral Gulch always has water.

Q. What about Little Willow Creek?

A. It always has some water in it, but it doesn't run very much though.

Q. You may state the character of these streams as to whether they are always flowing above ground, or do they appear and recede and disappear?

A. Well, the water will flow above ground in Gum Creek for maybe four or five—some place a mile and some places a mile and a half and then sinks away, under the gravel and flow for three or four or five hundred yards. And them creeks is of the same nature except Road Canyon which flows all the time, the year around.

Q. Does the water from these various creeks eventually flow from below the surface or on the surface into what? A. Willow Creek.

Q. Do these various creeks ever have flood waters of their own? [769—713]

A. Yes, sir; they all have flood water of their own.

Q. What time of the year does that come off?

(Testimony of Leonard Cole.)

A. Generally in February and March or along like that.

Q. Do the flood waters of Willow Creek—are they composed of a part and portion of the flood waters of these several creeks?

MR. HUNTINGTON.—Objected to as leading.

Q. State whether is not it is then.

A. It is; and the biggest majority of the water of Willow Creek is from these various creeks.

Q. Have you ever measured the length of these various creeks or any of them on either side of Willow Creek; that is, by measurement, have you ever measured it?

A. Not the entire creek; I never have.

Q. Can you state approximately the length of the creeks? A. Well, the first one—

Q. I ask you, can you state approximately?

A. I was going to state approximately the length of all of them, if that is the question.

Q. Now, Mr. Cole, can you state the length of the creeks in a general way, having reference first to those on the left-hand or west side of the creek going north?

A. Well, they are five or six miles to fifteen miles long.

Q. And what about the length of the creeks on the east side or right-hand side of Willow Creek as you go up?

A. Some of those creeks are not over three or four mile, but two of them are about fifteen miles. I think Dry Gulch is about fifteen miles long, and

(Testimony of Leonard Cole.)

Baker Creek, oh, probably about twelve miles long, I guess. [770—714]

Q. What is the longest of the creeks on the west side or left-hand side as you go up?

A. Well, there is not much difference between Gum Creek and Little Willow Creek or Current Creek.

Cross-examination by Mr. HUNTINGTON.

Q. As I understand you, these three creeks you have last named are about fifteen miles in length?

A. Well, yes, sir; approximately about that long.

Q. How far do you think it is from the foot of the hill on the west side of the valley—now, by the foot of the hill, I mean, the foot of the higher hill commencing on top of the level bench land and ascending up the hill—how far is it up to the top?

A. It varies a good deal.

Q. Well, about how far?

A. Well, there is not any three places it would be the same height.

Q. Well, run all the way from half a mile to a mile?

A. In some places it would be more than that.

Q. How far would you have to go to the top of the hill?

A. Well, take it up between Black Creek and Pole Creek it would be about ten or twelve miles to where you could see down to [771—715] Bully Creek.

Q. Well, you would get to the top of the hill some time before you could see down on Bully Creek?

A. Not very much.

(Testimony of Leonard Cole.)

Q. Isn't it true that when you get to the top of the hill on that side there is quite a wide plateau, at least in some portions of that divide which slopes toward Bully Creek and before you get to the valley of Bully Creek?

A. In some places it would, and some it would not. It is a hard place to find where they head would come.

Q. On the other side you would say Dry Gulch is about fifteen miles in length, I understood you?

A. Yes, sir.

Q. And Baker Creek about 12 miles long?

A. Yes, sir.

Q. Are they the two longest creeks?

A. Yes, sir.

Q. You never have gauged any of these creeks, I take it; that is, put in a wier and undertaken to measure them? A. No, sir.

Q. And when you say a larger quantity of water comes down there through these creeks you are simply giving your estimate of it?

A. I take that from a personal observation. The Government gauged the creeks at Emory Cole's and also gauged it below Malheur City, and almost double the amount of water flows through the gauge at Emory Cole's as at Malheur City. That is not one-fourth of the creeks that come in from this side. My estimate is gauged upon their gauges and upon my own personal observation. I have seen waterspouts come down these short creeks and run water two or three feet deep over three or four hundred acres of

(Testimony of Leonard Cole.)

ground sometimes. [772—716]

Q. How far is it from the mouth of the canyon above the Cole place to the headwaters of Willow Creek? A. Which part of Willow Creek?

Q. The highest source of Willow Creek.

A. The highest ground, you mean, or the next stream?

Q. The longest stream, or the farthest away.

A. From the mouth of the canyon?

Q. Yes, sir.

A. Well, if you would follow the creek up it would be about sixty-five miles in my judgment.

Q. How far is it from the mouth of the canyon up to Malheur City? A. About twelve mile.

Q. Following the contour of the creek?

A. About twelve or thirteen mile.

Q. Now, how many of these side creeks come into Willow Creek or discharge their waters into Willow Creek above the bridge at Dells where the Government measurements were made? Name them.

A. Mormon Basin Creek.

Q. No, now all these side creeks that come in that you have been talking about in your testimony.

A. Above Dell?

Q. Yes, sir.

A. Very few of them above Dell; most of them are this side.

Q. Are there any above the bridge?

A. Yes, sir.

Q. Which one?

A. Well, the road canyon is above the bridge and

(Testimony of Leonard Cole.)

Kendall's Spring Creek above the bridge and Baker's Creek.

Q. Any others of those you have named? [773—717] A. I don't think so.

Q. Baker's Creek has been for a good many years all taken up by an irrigating ditch, hasn't it?

A. It runs into Logan's irrigating ditch and McDaniels.

Q. And that takes all of the ordinary flow of that creek anyway and part of the flood water of the creek?

A. Very little flood water ever appropriated out of that creek. Them people irrigates after the flood water is gone, generally.

Q. Well, isn't it true that their irrigating ditch takes out of that creek to its full capacity when the water is coming down?

A. In the irrigating season. I never saw Logan irrigate in the flood water season.

Q. Where does Kendall's Spring Creek come into Willow Creek?

A. It comes into Emory Cole's ditch and runs right through Section 16.

Q. Emory Cole is your brother?

A. Yes, sir.

Q. Did you reside on what is known as the Cole ranch? A. Yes, sir.

Q. How long?

A. Oh, I was there from 1872 until, oh, until twenty-five years ago, I guess.

Q. Have you resided there all the time since?

(Testimony of Leonard Cole.)

A. No, sir. I commenced living there in 1872, and left about 25 years ago. But I have been there off and on ever since, though.

Q. Where have you resided most of the time since?

A. I have been to Huntington, Payette and Vale. When I was in Huntington, I bought cattle. [774—718]

Q. If you don't go into these side matters—I asked you when you *when you* moved there?

A. I filed on some land there in 1881 as a pre-emption and I lived there from the time I was quite a boy up until I was a man grown.

Q. When did you move over to Huntington?

A. I don't know exactly; I think I went to Huntington in 1891, I think.

Q. And had you lived on the Cole ranch or in that immediate vicinity all that time, up to that time?

A. Yes, sir.

Q. How long were you in Huntington?

A. I was there—well, I was in Huntington 12 or 14 years.

Q. And then moved to Payette? A. No.

Q. Where?

A. At Old's Ferry, operating his mining boat—mining dredge.

Q. When did you leave there?

A. I left there in 1906, I think.

Q. Did you go to Payette at that time?

A. Yes, sir.

Q. When did you leave Payette?

(Testimony of Leonard Cole.)

A. Shortly after I left this boat. I don't remember the exact date I left. I left the boat and came over here to work for the Willow River Land & Irrigation Company.

Q. That was in 1907 or 1908?

A. Yes, sir; 1907 and then came back again later on.

Q. Did you convey to the defendant company your pre-emption claim?

A. No, I let my father have that and he let my brother have it.

Q. So that at the time you conveyed, or at the time your [775—719] brother conveyed this land to Mr. Brogan, did you own any part of that land up there?

A. No, sir.

Q. You are one of the stockholders of this defendant corporation? A. No, sir.

Q. Don't you own any stock in it?

A. No, sir.

Q. Not a dollar?

A. No, sir; I don't own a dollar's worth of it.

Q. Have you never owned any stock in it?

A. No, sir; I have never owned any stock in it.

Q. Do you own any of its bonds?

A. No, sir; I don't own any of its bonds.

Q. What is your relation to the defendant company?

A. I am employed *by* a salary by this company.

Q. You have no official interest in the company at all? A. No, sir.

Q. Not a dollar? A. No, sir.

(Testimony of Leonard Cole.)

Q. You bought the Emory Cole place first, didn't you? A. Yes, sir.

Q. And then you conveyed it to Mr. Brogan?

A. No, I bought it for him; it was conveyed for him and his associates, or for that company all the time. I never had it in my name at all, no part or parcel of it.

Q. How much was the profit you derived from that transfer?

Mr. HART.—Objected to as improper cross-examination, and as immaterial. [776—720]

A. I got my salary just the same as any other labor I performed.

Q. You did, however, convey to the defendant company the lands that you claimed up in the canyon? A. Yes, sir.

Q. Now, those lands were all covered by your mining filings? A. Yes, sir.

Q. You don't claim to own any land up there, except what was covered by your mining filings?

A. I had some land possibly that wasn't covered by that particular body of country.

Mr. HART.—Objected to as incompetent and ask that it be stricken unless counsel asks the question in such a manner so as not to mislead the witness. The witness has owned the ditches that run on both sides of the creek for years, and has owned the land the ditches are on by adverse possession for years. Now, if you will state your question so as not to mislead the witness I have no objection to it.

Q. I am not referring to water or any water rights

(Testimony of Leonard Cole.)

that you may claim, but I am talking about your mining ground? A. I have other mining ground.

Q. Did you claim to own any mining ground except what was covered by filings? A. Yes, sir.

Q. Where was it?

A. At different places all over the country.

Q. At different places all over the country?

A. Yes, sir.

Q. Ground that you never filed on at all? [777—
721]

A. I filed on it—oh, I filed on it one way or the other.

Q. But I am talking about ground that you never filed on? A. Yes, sir.

Q. Whereabouts?

A. In that same country.

Q. Whereabouts? A. In that canyon.

Q. Whereabouts in that canyon?

A. All the way up and down the canyon. I have had possession of it for years.

Q. You claimed it all the way from the mouth of the canyon to the head of the canyon?

A. Yes, sir.

Q. Why didn't you file on it?

A. Well, I had it located before it was surveyed, and I have been operating and handling it.

Q. You had it located before it was surveyed?

A. Yes, sir.

Q. Then why did you file on what you did file on?

A. I filed on it because I had parties in with me and they wanted to know where it was located.

Q. You never filed any claim in the United States

(Testimony of Leonard Cole.)

Land Office, did you, for any part of it?

A. I don't remember as I ever did.

Q. No, sir. And when you filed in 1894 on portions of the land in the canyon you at that time filed on all the portions you claimed any interest in at that time?

A. No, sir. I had some land that I did file on because I had some partners. I had this ground located before I located it, when it was subdivisionally described. I had it located long before that. [778—722]

Q. How did you locate it?

A. So many hundred feet one way and so many hundred feet another way and by mounds and pickets. It was described by mounds and pickets on certain hills and knolls.

Q. Did you have notices filed on those filings?

A. Yes, sir, some of them.

Q. Where were they?

A. In the office here before those notices were scattered.

Q. Did those notices cover any of the land covered by these notices? A. Yes, sir.

Q. How much of the land covered by these notices which you have been talking about as having been filed before the surveys was included in those notices which were filed in 1894 by you and Eddy and Insenhofer and others?

A. Of this same land?

Q. Yes, sir.

A. Well, it covered practically all of that land.

(Testimony of Leonard Cole.)

Q. Practically all of that land? A. Yes, sir.

Q. Well, now, getting back to my original question, then all of the land that was filed upon in 1894 or subsequently is all the land you claimed in there?

A. No, sir, I never said that.

Q. But you just said that all of the land you filed upon with those filings before the survey was covered by the filings made subsequently?

A. I didn't say that.

Q. You said practically all?

A. No, I didn't say that.

Q. Now, what portion of the land covered by your old filings [779—723] which you say were made before the survey is covered by these filings made in 1894 and subsequently?

A. I said before I had it surveyed, I didn't say anybody else had it surveyed.

Q. Well, before you had it surveyed then?

A. Now, what is your question?

Q. (Previous question read to witness.)

A. That was before I had it surveyed, not before the United States or Government had it surveyed.

Q. You know what I mean now answer my question. I want to know how much of the land which was covered by the old filings which you say were made before you had the land surveyed is covered by the filings made in 1894 and subsequently.

A. The filings made in 1894 I think covers 280 acres of land, and I filed, and the people I had with me, on six or 700 acres of land without having it subdivisionally described.

(Testimony of Leonard Cole.)

Q. And you say those filings are of record?

A. Some of them are.

Q. Where are the others?

A. Some have never been recorded.

Q. How much was recorded?

A. I don't remember exactly.

Q. Will you produce them?

A. I suppose I could.

Q. I wish you would do so during this trial.

EXAMINER.—Do you wish them now?

Mr. HUNTINGTON.—No, not at this minute.
No.

Q. You were superintendent until Mr. O'Donnell came?

A. I am working for the company in the same capacity. He took my place at the reservoir.

Q. He was the engineer that made the surveys for you which you [780—724] have spoken of?

A. Well, we have had different men make surveys.

Q. Well, who was the engineer that surveyed and planned your dam up to there in the canyon?

A. Well, Mr. Knute done some surveying and Mr. Ashford.

Q. Where is Mr. Ashford?

A. And Mr. Richardson. Mr. Quigley done some surveying.

Q. Did you have any engineer who laid out this project for you? A. Yes, sir.

Q. Who was it?

(Testimony of Leonard Cole.)

A. Mr. Knute, Mr. Ashford and Mr. Quigley; all three engineers.

Q. Where is Mr. Ashford?

A. He went to Seattle not long ago.

Q. Where is Mr. Quigley?

A. Up at the work.

Q. Where is Mr. Knute?

A. He went away from here this morning.

Q. He was here in attendance upon this hearing at the request of the defendant company, wasn't he?

Mr. HART.—Objected to as incompetent and irrelevant.

A. Well, he wasn't called for that purpose. He was here.

Q. And he went away this morning?

A. Yes, sir.

Q. He is the one that planned the dam, isn't he?

A. Yes, sir.

Q. And he didn't superintend its construction as I understand you?

Mr. HART.—Objected to as incompetent, immaterial and [781—725] irrelevant, and improper for any other purpose except an attempt to checkmate or annoy the witness.

WITNESS.—Well, Mr. Knute (or Noot) had been in the employ of the company for quite a while after that and it was built according to the directions he laid out.

Q. Now, when did you commence the construction of the dam? I mean when was the actual construction of the dam itself begun?

(Testimony of Leonard Cole.)

A. Why, it was along some time the last—well, sometime the last of February or first of March.

Q. You began it then in the season when floods are most expected?

A. Yes, sir, we began it when floods are expected all right.

Q. And your construction continued along, you say, until the notices were served and up to that time you had spent how much money?

A. Up to that time we had spent about \$27,000.00.

Q. Now, can you tell us in what way it was spent?

A. In engineer works, surveying, plats and plans, and specifications and recording and in general work, and by getting ready same for reservoir purposes, and some for material, and some for horses and rigs and wagons and stuff to go to work with.

Q. Had you constructed Pole Creek reservoir?

A. Yes, sir, some of it.

Q. And some of it after that?

A. Some of it for every place we work.

Q. Can you give us a statement as to how much was spent in the construction of the dam aside from the matter of plans and specifications and surveying?

A. No, sir, I can't. [782—726]

Q. At that time the trunk of your dam was just commenced, wasn't it?

A. The excavation of the dirt had been going on some time then.

Q. The excavation for the core of the dam hadn't

(Testimony of Leonard Cole.)

yet been commenced?

A. No, I don't think it had.

Q. And as a matter of fact, you hadn't done any cement work at that time?

A. We had hauled some cement. We had taken some over there from Payette.

Q. But you hadn't used any cement in the construction of the dam at that time, had you?

A. I don't remember the very day we used cement. I think we put cement walls in before I ever received any letters. Quite a while before that. I am not positive about that.

Q. But as late as July 24th you hadn't completed the trunk to your dam at that time?

A. Well, we had a great deal of work to do on that trunk.

Q. But you hadn't completed it as late as July 24th? It was just about half completed at that time, wasn't it?

A. I don't remember exactly. I think you are about right about that.

Mr. HART.—1908?

Mr. HUNTINGTON.—Yes, sir.

Q. You kept right on after you got these notices just the same as though you hadn't received them?

A. I never ceased to work after the time I started.

Q. You kept right on after this suit was begun as before? A. Yes, sir.

Q. And after the application for a preliminary injunction? [783—727] A. Yes, sir.

(Testimony of Leonard Cole.)

Q. Your company paid no attention to any of the claims of the complainant about these matters?

A. No, sir.

Q. You knew and Mr. Brogan knew all the time from the time he came here that Willow Creek flowed through a large amount of the Eastern Oregon Land Company's land?

A. Not at that point it didn't.

Q. I am talking about taking the whole line of the creek? A. I don't know—

Q. From the dam site down?

A. I don't know what Mr. Brogan might know.

Q. Didn't you talk with him about that?

A. If I did he wouldn't without he saw the land.

Q. He would know what the fact was if you had told him? A. No, I didn't say that, sir.

Q. That is just a question I asked.

A. I didn't say that.

Q. I didn't say you did. You knew they owned land up and down the creek from below the Scott place up to the head of the valley, didn't you, through which Willow Creek ran?

A. Yes, sir, I knew they claimed to own it.

Q. And you knew generally that the company owned the odd sections of land all the way up Willow Creek to a point up as far as Malheur City, didn't you?

Mr. HART.—Objected to as immaterial.

A. I don't know that they owned any land up in Malheur City, five or six miles from where they claim their road land.

(Testimony of Leonard Cole.)

Q. Perhaps I have got that too far. Up as far as Section 21 then [784—728] in Township 14 South, Range 42 East?

A. I didn't know they owned any land in Section 21, Township 14 South, Range 42 East.

Q. Well, you knew they owned the odd sections of land on each side of the old The Dalles Military Road?

A. I thought there was a three-mile limit on each side of The Dalles Military Road.

Q. To the extent of the three-mile limit, you knew that?

A. I knew they had odd sections; I didn't know exactly what odd sections they were. This is over three miles from any line of road they could claim, without they claim one up the Willow Creek canyon where there never was one made until we built the road ourselves.

Q. Now, you have testified that you have complied with the law of the United States with respect to these mining claims. What law do you refer to?

A. To the law of the United States.

Q. Well, there are a great many laws of the United States, what particular laws?

A. Any of them and all of them.

Q. The homestead law and pre-emption law?

A. Are you talking about homesteads and pre-emptions?

Q. No.

A. Why do you ask me in regard to homesteads and pre-emptions? Mining laws.

(Testimony of Leonard Cole.)

Q. You mean placer mining laws?

A. Yes, sir.

Q. What is the placer mining law of the United States with respect to claims?

A. You can go to work on one claim and work the representative work on all the claims that joins it. That is my way of reading the law. Cox Code is the one I have cited. [785—729]

Q. Where did you explain the \$4,400.00 that you say you spent in 1895?

A. The \$4,400.00 I said I spent in 1895?

Q. Yes, sir.

A. Some of it hauling provisions in for men to use, and some of it for tents, and some of it for flumes, building ditches and some of it for hydraulics and giants, and some of it in the way of opening the channels of Willow Creek, making preparations to put bedrock flume in the bed of the creek, and some of it in building roads in there. There was no road in there when I went there and I had to build a road to get provisions in. There wasn't a fit road to drive teams over.

Mr. HART.—How about wages?

A. Why, I spent about \$2,500.00 for wages, I guess.

Q. The ditch on the west side of the creek was a ditch which Mr. Boswell had constructed years before, wasn't it?

A. It was constructed by Mr. Boswell, Mr. Layton and others, and Mr. Boswell had done the last work that was done on it before I took posses-

(Testimony of Leonard Cole.)

sion of it; that is, the last work that was done on completing building it farther down. Mr. Turner and one of Mr. Boswell's sons run some water through it before I got possession of it.

Q. And Mr. Boswell had built the house in there and you took charge of that? A. Yes, sir.

Q. When was the last hydraulic mining done there in the canyon?

A. Well, there is some going on there now.

Q. When was the last hydraulic mining done in the canyon on either Section 27 or 21 in the township and range we have [786—730] been talking about?

A. There was some done there last fall.

Q. Where was that? A. In Section 27.

Q. What part of the section?

A. Right at the dam site; that is, where Mr. Johnson run 27 out, the way he run it out.

Q. That was done in the construction of the dam, however, wasn't it? A. Last fall?

Q. Yes, sir. A. Yes, sir.

Q. Now, I am talking, apart from any construct- ing work of the dam, when was the last hydraulic mining done there?

A. There has been hydraulic work done there every year since 1894 or '5 we finished the ditch, one part or the other.

Q. That you swear positively to, Mr. Cole, every year? A. I paid for it being done every year.

Q. You leased the mine several years?

A. Well, I got paid for it. They give me 25%

(Testimony of Leonard Cole.)

royalty out of the money. I got paid for it.

Q. That is different proposition from paying them for the hydraulic mining?

A. No, sir, I don't think so. They took their money out of my ground. They got their compensation out of the ground and the ground belonged to me and so I paid them.

Q. Who mined there in 1908?

A. Mr. Insenhofer was repairing ditches and working there all the time up until this company come and took it, and when they commenced operation he came away.

Q. Who done any hydraulic mining there in 1908? [787—731]

A. We done it in the way of working on the reservoir in 1908 and we took out some gold too.

Q. Then, you claim the work done in the construction done on this reservoir is assessment work on your mining claim, do you?

A. I think it is. It is work going on on the ground. We took gravel out to the bedrock of the creek and we took gold out too.

Q. Who did hydraulic mining there in 1907?

A. Captain Dwyer.

Q. Where did he get his water?

A. Out of Willow Creek.

Q. Did he get it through that ditch on the west side of the creek?

A. There was water in the ditch on the west side of the creek.

Q. Will you swear there was any water run

(Testimony of Leonard Cole.)

through that ditch in 1907, Mr. Cole?

A. There wasn't water in that ditch part of the way every year. It might not have gone all the way through.

Q. Yes, sir, possibly at the very head. Where is the work being done which you speak of being done just above the Beers ranch? How far above the Beers ranch?

A. Why, I would have to kind of guess at that. I didn't measure it myself from the Beers ranch. It is from a half a mile to a mile above the Beers ranch.

Q. On what section or sections?

A. Well, I would have to look at that map to tell you exactly. It is very near the section line. Either 14 or 15, I think. That is from memory.

(Counsel hands witness map.) (Witness examines map.)

Q. Now, indicate about where the dam is located or is to be located. [788—732]

A. Right along there some place.

Q. Close to the line between Sections 14 and 15 in Township 14 South, Range 41 East?

A. I couldn't say just which section it is in.

Q. You think it is close to the line between Sections 14 and 15?

A. Yes, sir, if I had the notice here and read them I could tell you exactly.

Q. You testified that that storage reservoir had a capacity of forty or fifty thousand acre feet. Who did the surveying and contour work?

A. Why, Mr. Quigley did the most of it.

(Testimony of Leonard Cole.)

Q. Did you assist him? A. Yes, sir.

Q. Did you figure the result of his measurements?

A. I did approximately. I am not a very good hand at figuring those things.

Q. Is the water to be taken out of that upper dam by a ditch or turned into the creek and brought down the creek?

Mr. HART.—Objected to as immaterial.

A. I think it is to be brought down the creek. Now, I have not been instructed in regard to the matter. That is just merely my belief.

Q. Now, coming down to the lower dam. You say that the core of that dam extends up above the level of the creek-bed about three feet, as I remember it; is that right? A. In width?

Q. How high is it?

A. I don't know exactly. I think it is—in walking along the [789—733] side of it when they had it tamped in it was above my head, but where I walked was a little bit lower than some of the creek-beds and some of it wasn't.

Q. What would you say, from five to six feet?

A. I think so; I never measured it.

Q. Is that as high as the core is to be constructed?

A. I don't think so.

Q. How high is it to be constructed?

A. Well, Mr. Brogan thought at first—

Q. Don't state what Mr. Brogan thought, just say if you know how high it is to be constructed?

A. I wouldn't know.

(Testimony of Leonard Cole.)

Q. It is about 18 inches across on top when you last saw it?

A. I think so. That is, just from looking at it.

Q. How high is the dam to be constructed?

A. There has been estimates taken at different heights and run at different heights.

Q. Well, for which height is the construction of the dam prepared?

A. Well, there has been two levels made of the dam.

Q. And you don't know for which one then?

A. I don't know which one they intend to build.

Q. What are the two different heights?

A. 100 and 160 feet.

Q. If it is to be built 160 feet high it would necessitate a different foundation from what it would if it was to be built a hundred feet high, wouldn't it?

A. Well, the foundation is sufficient to build it 160 feet if they wish to build it so.

Q. How wide is the bottom of the dam from the commencement of the dam up-stream down to the lower end? [790—734]

A. It is laid for a little over 400 feet.

Q. How long is your trunk—270 feet is that right?

A. It is a little longer than that, I guess. I never said anything about 270 feet in that trunk.

Q. How long is your trunk?

A. A little over 400 feet.

Q. How much over 400 feet?

A. I don't remember exactly.

(Testimony of Leonard Cole.)

Q. Now, you have spoken about the difficulty in putting in that core. The core went out on you once, or broke off? A. It never broke off.

Q. Never broke off at all? A. No, sir.

Q. What was the difficulty you had?

A. In overcoming the water and handling quicksand in my cribbing.

Q. When you begun to sluice there no part of it broke off?

A. No, sir, no part of it broke off, no part nor parcel.

Q. How wide was the place where you say you went down 37 feet?

A. Which way do you mean?

Q. Well, perhaps you had better say length then. How wide is the place crossed by the core where you went down 37 feet?

A. You mean how long, or did it extend for 37 feet?

Q. Yes, sir.

Q. Why, I think it was 24 feet.

Q. At the bottom or top?

A. 24 feet at the bottom.

Q. How far across would it be at the top?

A. Why, I suppose it would be 24 feet at the top if you meant that 37 feet, if the way you said. You don't seem to understand it. [791—735]

Q. Well, either I don't understand it or you don't. Was this place that you say you had to go down 37 feet below the creek in order to get to the bedrock where you put the cement in, was this place

(Testimony of Leonard Cole.)

in the channel of the creek?

A. Yes, sir, right in the channel of the creek.

Q. Now, how far across was it at the top of that deep place in the channel of the creek?

A. From solid bedrock on each side and in the bedrock we put the work 270 feet is my recollection.

Q. How far across was it at the bottom of that place?

A. That very deepest place was about 24 feet wide, that deep channel.

Q. And that core at the bottom of the 37 foot depth was three feet and then it narrowed up to the very top of the core as you last saw it until it got up until it was eighteen inches wide?

A. No, it didn't narrow all the way. It never narrowed until it got close to the top of the ground. It continued three feet all the way up down there.

Q. At the time these notices were served upon you, you hadn't commenced the construction of the core? A. No, sir.

Q. At the time this suit was commenced you hadn't commenced the construction of the core?

A. Oh, yes, sir. When the notices were served I was plowing and seraping the ground out to put the core in.

Q. But the cement work was all done afterwards?

A. In the core?

Q. Yes, sir.

A. I had a good deal of cement on the ground at the time I first received those notices and a good deal of lumber [792—736] hauled there. And I had

(Testimony of Leonard Cole.)

some pictures taken which I can show you if you want to see them.

Q. You say the dam is now fifteen feet in height in some places?

A. Yes, some places it might be twenty feet high and some ten or twelve. I couldn't say exactly just looking at the work. It might be 25 feet in some places.

Q. And you have already expended you say \$80,000.00 on this project? A. Yes, sir.

Q. And you have a dam, as a result, somewhere from ten to twenty feet in height?

A. Well, we have other dams and other work we have done too.

Q. How much have you spent on this particular part of this project?

A. I never kept it separate.

Q. And you don't know anything about it.

A. Not particularly; I have an approximate idea.

Q. What is your approximate idea?

A. I think over \$60,000.00 at that place.

Q. And you have got a dam from ten to twenty feet high as a result?

A. Well, it might be more than that as I have not been there for two or three weeks.

Q. Referring again to your alleged upper reservoir which you say will have a storage capacity of forty to fifty thousand acre feet, how high a dam is to be built there?

A. Well, to take it over 40,000 it will have to be a hundred feet high.

(Testimony of Leonard Cole.)

Q. How far would that take the water back?

A. 100 foot level would take the water from only up to the [793—737] Moffitt place.

Q. That would then cover the Cornell (?) place and Rose place? A. Yes, sir, practically.

Q. Has the defendant company acquired title to those lands? A. I don't know.

Q. Referring again to the lower dam. Do you know, where the proposed diversion dam is in Section 2 below the lower reservoir?

A. Yes, sir.

Q. Does Baker Creek come in below or above that? A. Below.

Q. How far?

A. I would think about two mile; it might not be quite that far.

Q. Does this map you have been looking at correctly represent the location of that creek?

A. I don't think I ever seen a map that did.

[794—738]

Redirect Examination by Mr. HART.

Q. Now, Mr. Cole, you spoke of the water in those ditches running along through Section 28 above the dam site and the ditches on the other side also of the creek. I wish you would tell me where the ditch commences that has the water in it on the left-hand side of the creek when you go up stream?

A. It commences about two mile above the mouth of Mormon Basin Creek.

Q. On the left-hand side of the stream, but Mormon Basin Creek is on the right-hand side of the

(Testimony of Leonard Cole.)

creek as you go up? A. Yes, sir.

Q. Then how does it flow from that place where it commences?

A. It goes down on the left-hand side of the creek going up. If you were going up it would be on the left-hand side of the creek and on the right-hand side coming down.

Q. Runs on down into what section?

A. Twenty-seven. That is the way they have got 27 showed, the way they have been showing and dodging around there without any section lines to go by.

Q. Well, at the place where this ditch running through Section 28 is, and just before you get to the dam site, about how high above the dam site is that?

A. That ditch is—the bottom of the creek at the dam site is about 155 feet below the discharge of the ditch onto 27 where they have got 27 laid out there, according to an aneroid. It is the thing that gives the elevation. [795—739]

Q. According to that instrument used to show elevation? A. Yes, sir.

Q. Through what sections does the ditch on the left-hand side going up the creek run?

A. It runs through—I don't know as I can tell all the sections by memory.

Q. Where is it taken out?

A. It is taken out close to the section line of 24.

Q. Along the right-hand side of the creek going up. That is on the left-hand side you are speaking of now.

(Testimony of Leonard Cole.)

A. I can't tell you exactly the sections it runs through.

Q. The one over on the Mormon Basin side of the creek, where is that ditch taken out?

A. That would run through, I think that would run through 17, and it might possibly run around 21, I ain't sure. I think it does though. It either runs through 17 and 21 or around them and 28 and is surveyed out onto 27. It never was completed that far.

Q. As I understand it, one of the ditches is on the left-hand side and one on the right-hand side?

A. Yes, sir.

Q. And would the ditch—those two ditches and one on the left and one on the right extend sufficiently back so as to be on the right and left respectively of the reservoir when filled with water?

A. Yes, sir.

Q. You say you acquired this from Mr. Moffitt?

A. No, I bought those ditches from Mr. Boswell.

Q. Did he sell them to you? A. Yes, sir.

Q. How much did you pay him for them?

[796—740]

A. \$150.00 for his house and ditches and what land he owned there at that. Whatever title he had there—whatever he might have.

Q. Since that time who has been in the possession of the ditches and the land on both sides up and down the creek?

A. Myself and Mr. Insenhofer, and we have done work on both sides on both ditches at various times. We have not completed the ditches on the right-hand

(Testimony of Leonard Cole.)

side as you go up but we have been compelled to spend probably \$1,500.00 on it.

Q. That possession has continued from the time you acquired possession from Mr. Boswell?

Mr. HUNTINGTON.—Objected to as leading.

A. Yes, sir.

Q. Up to what time?

A. Up to the time we turned them over to the defendant company.

Q. State whether or not that possession has been open, notorious, continuous and adverse from 1894 (that is when I understand you got it from Mr. Boswell) or 1895 up to the time it was turned over to the defendant company.

Mr. HUNTINGTON.—Objected to as leading, calling for the conclusion of the witness, incompetent and improper in its form.

A. I have had possession of that property ever since 1894, notorious, open and above board of everybody, maintained it and directed it.

Q. Has it been adverse to all other claims?
[797—741]

Mr. HUNTINGTON.—Objected to as leading, calling for the conclusion of the witness, incompetent and improper in its form.

A. Yes, sir.

Q. You may state whether or not your possession has been visible during all these years.

Mr. HUNTINGTON.—Objected to as leading, calling for the conclusion of the witness, incompetent and improper in its form.

(Testimony of Leonard Cole.)

A. It has been visible during all those years.

Q. And I understood you to say the rights which you had the present defendant company now holds?

A. Yes, sir.

Q. Now, you spoke awhile ago of getting some royalty of 25%. Was that when the Chinamen were working it?

A. Yes, sir, they worked it two different years.

Q. Do you recall the amount of royalty they paid you annually?

A. I only got \$900.00 out of them the two years. \$450.00 a year about is what it averaged the two years they worked it.

Q. Who kept track of the gold that was extracted? A. Myself.

Q. Were you there at the clean-ups?

A. I went out there at the clean-ups; I was the man that took charge of it.

Q. During the various years that has been mined has gold been taken from them?

Mr. HUNTINGTON.—Objected to as leading.
[798—742]

Q. Now, counsel asked you in substance: "Didn't you know that the Eastern Oregon Land Company owned odd sections, amongst others, were Sections 21, 27 and Section 3, through which the canyon runs?" Did you know at the time you bought in there from Mr. Boswell, at the time you were carrying on your mining works that this company owned or claimed those sections?

A. I didn't know that this company owned or

(Testimony of Leonard Cole.)

claimed to own those sections. I thought it was farther than three mile to any road they have ever built or knew of or was surveyed out.

Q. The defendant company—the complainant company is the successor of what is commonly known as The Dalles Military Road Company?

A. Yes, sir.

Q. Do you know, generally speaking, the conditions under which they acquired their ground—what was the land to be given to them for?

Mr. HUNTINGTON.—Objected to as incompetent, wholly irrelevant, calling for the conclusion of this witness, and in no way connected with the issues in this case and wholly immaterial.

A. They got that land for building a road that they never built.

Q. I did not ask that question. Do you know whether one of the conditions of the original grant to The Dalles Military Road Company was for what?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, [799—743] and entirely foreign to the issues of this case, and for the further reason that there is nothing to show that any stockholder or any person interested in The Dalles Military Road Company is or ever was associated with or connected with the Eastern Oregon Land Company. And no person connected with the Eastern Oregon Land Company is or ever was connected in any way with The Dalles Military Road Company or had any interest in that company, and that there is nothing to show that the Eastern Oregon Land Company did

(Testimony of Leonard Cole.)

not purchase this land from *bona fide* purchasers from The Dalles Military Road Company. And the purpose of this investigation of this witness in respect to this matter is simply for the purpose of getting into the record old claims or reports as to the building or not building of The Dalles Military Road, with which this complainant had nothing to do.

WITNESS.—Yes, sir.

Q. What was that?

A. For the completing of a road across this country they never did complete.

Q. From where to where?

A. From The Dalles—I think it was to be completed to Fort Boise or the river this side probably. That is my recollection.

Q. Or do you know, or what is your general understanding as to the width of the grant on each side when completed?

A. I understood it was to be within a three-mile limit of the road.

Q. Every odd section or every other odd section—what was your understanding? [800—744]

Mr. HUNTINGTON.—We desire to make the same objection as last above.

A. Well, the general talk was they got every alternate section on each side three miles of the road.

Q. Alternate odd or even sections?

A. Alternate odd sections.

Q. You have lived here you say since when?

A. Since 1868 I have been in the country.

Q. Was there ever any road constructed within

(Testimony of Leonard Cole.)

three miles of that property up the canyon by The Dalles Military Road people?

Mr. HUNTINGTON.—We desire to make the same objection.

A. No, sir.

Q. Was there any constructed within ten miles of that place? A. Yes, sir.

Q. By that company?

Mr. HUNTINGTON.—We desire to make the same objection.

A. No, sir, not by that company.

Q. Or by the successors of The Dalles Military Road Company?

Mr. HUNTINGTON.—We desire to make the same objection.

A. No, sir.

Q. At the time this property was being used as mining property, and at the time you filed your claims there, did you then know there had been no road within ten miles of that property [801—745] constructed by The Dalles Military Road Company or its successors?

Mr. HUNTINGTON.—We desire to make the same objection.

A. Yes, sir.

Q. You speak of land—counsel asked you if you knew of land owned by the complainant company. Do you mean land owned or land claimed by them?

Mr. HUNTINGTON.—We desire to make the same objection and leading.

A. I meant land claimed by them. I have never

(Testimony of Leonard Cole.)

thought they had a legal right to that land. I never had any idea they had.

Witness excused.

At the hour of 4:55 o'clock P. M., July 27th, 1909, adjourned until 7:30 o'clock P. M. to-night, July 27th, 1909.

At the hour of 7:30 o'clock P. M., July 27th, 1909, met pursuant to adjournment as above. Present: Same as before. [802—746]

**[Testimony of Leonard Cole, for Defendant
(Recalled—Cross-examination).]**

LEONARD COLE, a witness recalled on cross-examination, having been heretofore sworn, testified as follows:

(Examined by Mr. HUNTINGTON.)

Q. How many different mining locations do you claim to have made on Willow Creek below Mormon Basin?

Mr. HART.—Objected to as incompetent and not proper cross-examination. I suppose you are talking about the land in Sections 21 and 27?

Q. I want to know how many he claims to have made?

A. I think I made about sixteen different locations. That is, in different bodies and groups.

Q. Did you make any above Mormon Basin?

A. I did.

Q. How many did you make above Mormon Basin?

A. I made more than sixteen altogether.

Q. How many above Mormon Basin and how

(Testimony of Leonard Cole.)

many altogether on Willow Creek?

A. There would be 19; that is my recollection.

Re-redirect Examination by Mr. HART.

Q. Some of these claims were in your own name, and some were in association names? [803—747]

Mr. HUNTINGTON.—Objected to as leading.

A. Some of them were in association names and my own name.

Witness excused. [804—748]

**[Testimony of Thomas W. Clagett, for Defendant
(Recalled—Cross-examination).]**

THOMAS W. CLAGETT, a witness recalled on cross-examination, having been heretofore sworn, testified as follows:

(Examined by Mr. HART.)

Q. Mr. Clagett, I wanted to call your attention to Sections 3 and 11 in Township 15 South, Range 42 East: You will remember those are the mountain sides—hillsides—in which the creek runs is still in its canyon form before it gets down to Cole's place, and after it leaves Sections 27 and 28. Do you recall that property?

A. The canyon runs through those sections; it doesn't embrace all the sections.

Q. Taking up first Section 3 of that township and range, I wish you would describe that.

A. I never ran out the lines of either Section 3 or 11. I cannot speak positively of the nature of those sections. There is no difference in the canyon from Cole's to Section 27, aside from the fact that in places the cliffs are perpendicular. Otherwheres

(Testimony of Thomas W. Clagett.)

they are broken so that a passage can be had to the plateau land above.

Q. If there is no plateau land above?

A. There is a plateau land above and on both of those sections.

Mr. HUNTINGTON.—I want to object to this testimony as not proper cross-examination. I make no objection to the testimony itself, but simply reserve the right to cross-examine this witness. [805—749]

Q. Now, through that you would say the creek is how many feet below—or the canyon cliffs run up along through those sections, 3 and 11, how many feet?

A. My guess at it would be from six to eight hundred feet in height.

Q. What is that land serviceable for?

A. In the canyon?

Q. Yes, sir.

A. Why, it has no value at all except passageway might be had to the water of the creek running through it.

Q. What is the land above?

A. It is table land on top.

Q. What is the land worth per acre?

A. As a grazing proposition in its present condition and development of the country it would not be worth over \$1.25.

Q. Well, is that the value of the land?

A. I don't think at this stage of the development of the country it has a selling value.

Q. Do you think \$1.25 is a fair value? You mean

(Testimony of Thomas W. Clagett.)

its market value as it stands there to-day?

A. I have said it has no market value at this time.

Q. Then its actual value there? Do you think \$1.25 an acre is its fair value?

A. Why, any price a man would put on it would be simply a nominal price. It is hard to say when there is no market what its value is.

Q. You said the bench land is worth a dollar to \$1.50. Is this land worth more or less?

A. I did not make that statement.

Q. Whatever statement you did make? [806—750]

A. This land is not worth any more than that land to which that statement applied.

Q. That applies to Section 11 and also Section 3?

A. Both sections.

Q. In Section 27, excluding again as to its value for mining purposes, Section 27 and also Section 21 in Township 14 South, Range 42 East, what is the value of that land?

A. As an agricultural or grazing proposition it is exactly of the same class. You say, exclusive of its mining value, it has a value for the purpose to which it is now being put—a reservoir value.

Q. To any value exclusive of mining value, what is it worth?

A. Well, it seemed to be worth—

Q. Not what it seemed to be worth; I want your answer to my question.

A. I apprised that land in the complaint that was filed in this cause.

(Testimony of Thomas W. Claggett.)

Q. At \$4,000.00?

A. I stated in excess of \$2,000.00, the land in Sections 27 and 21. I also had in mind—I didn't state \$4,000.00; I would like to change that.

Q. I may object to changing that.

Q. The remarks pertaining to the appraisal of the land are not all that I had in mind at the time I swore to the complaint. The value was put upon what I understood was the matter in controversy in making up my judgment as to the appraisal of this land, and putting a price upon this land regarding which counsel has asked. I had in mind the fact that the land had been sold, and it was on the fact of that sale that I based my appraisal so far as my appraisal ran to the value of the land alone. [807—751]

Q. Now, having made that statement, I wish you would state to me the value of that land exclusive—not taking into consideration the mining phase of it—the mineral phase of it and not taking into consideration the fact of their building a reservoir there.

Mr. HUNTINGTON.—Objected to as incompetent, not proper cross-examination, not a proper method of getting at the value of property, calling for a conclusion of the witness, without giving the witness opportunity to estimate the value of the property for the purpose for which it may be used, not a proper basis for the determining of the value of property, the value of property being that which it is worth, taking into consideration all the uses to which it can be put.

WITNESS.—As an agricultural—

(Testimony of Thomas W. Clagett.)

Q. I am not asking you that—I don't want limitations on it. For any purposes excluding those purposes? I don't care what those other purposes are.

A. As an agricultural or grazing proposition it is worth what I have stated; a nominal figure of about \$1.25 per acre.

Q. And that is the only value it has except the mining or reservoir site purposes? A. It is.

Q. Now, what is that property worth in your judgment including the mining—the mineral phase of it, but excluding the reservoir site?

Mr. HUNTINGTON.—We desire to make the same objection as that last above. [808—752]

A. I know nothing regarding its mineral value aside from hearsay.

Q. Then, you don't add anything to the value because of the mineral that may be in it?

A. I say that I am not able to and do not.

Q. So far as that is concerned, in your judgment that does not increase the value?

Mr. HUNTINGTON.—Objected to as leading.

A. In making my appraisal I did not consider the mineral value. (Previous question read to witness.) A. No, sir.

Q. Now, then, including the dam site—for all purposes how much is it worth?
same objection.

Mr. HUNTINGTON.—We desire to make the

A. I don't know aside from the price for which it has been sold for that purpose.

Q. Never mind what figures may be in the records;

(Testimony of Thomas W. Clagett.)

I ask your judgment of what the value of the property is.

Mr. HUNTINGTON.—Objected to as not proper cross-examination and incompetent.

Mr. HUNTINGTON.—The value that one person puts upon property is not the method for determining its market value. What it has been sold for is one of the methods of determining the value.

Mr. HART.—Read the previous question to the witness. (Previous question read to witness.)

A. In my judgment the property is worth what it has been sold [809—753] for. I have no other means of knowing its value.

Q. If it has not been sold for anything, why, then it is not worth anything?

A. Why, not for reservoir purposes.

Q. You know that whole canyon you can locate a reservoir up and down that canyon?

A. That is not true; no, sir.

Q. In many places in that canyon you can locate a reservoir? A. Not in the canyon probably.

Q. Can it be located up in Sections 20 and 21?

A. No, sir.

Q. Why not?

A. Because it has not rock walls to tie the dam to. There are no abutments there to which a dam can be anchored.

Q. Can't they build dams without walls? Don't they do it all over the world?

A. No, sir; you have to have bedrock in order to build a dam.

(Testimony of Thomas W. Clagett.)

Q. Suppose that it turns out the dam was sold or transferred for \$500.00; that would be the actual consideration, would you say then that was the value of it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, as supposing a condition which does not appear to exist, and wholly immaterial and incompetent.

A. I would not.

Q. What would you say, then, was its value?

A. I have stated I have no knowledge by which I could pass upon the value of the ground as a dam site.

Q. That property has lain there unoccupied and unused except by mining men and mining purposes for years and years. [810—754] A. Yes, sir.

Q. And the mere fact that it has got any value for reservoir or dam site is the fact this defendant company went in and built a dam site there?

A. No, sir; it is not true.

Q. You know of the storage dam site reservoir some five or six or seven miles farther up the creek?

Mr. HUNTINGTON.—Objected to as incompetent and immaterial.

A. I have known so since the last of June of this year.

Q. You were speaking the other day of your company checkmating. I will ask you if Mr. Martin and Mr. Mackenzie since this trial has been on these last few days, have they not also been up on the upper branch of Willow Creek above this dam?

Mr. HUNTINGTON.—Objected to as incompe-

(Testimony of Thomas W. Clagett.)

tent, irrelevant and immaterial.

A. I was told that they went there yesterday.

Q. I will ask you if they did not go up there and have not selected and located a dam site between the storage reservoir dam as located by this defendant company and their surface dam in Section 21 or Sections 27 and 28?

A. They have not yet returned since their trip, and I don't know what has been done.

Q. Don't you know it was the purpose of those gentlemen in going was to locate a dam or reservoir site between the two dam sites of this defendant company? [811—755]

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

A. I do not, and I do not think that was their purpose.

Q. Didn't you hear them say that was their purpose?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

A. I didn't know they were going.

Q. At any time did you know they were going up there? A. I knew they were going, yes, sir.

Q. You knew that they were going?

A. For the purpose of looking into the Willow Creek irrigation possibilities.

Q. Did that carry with it the location of a dam or reservoir site above Willow Creek and above where our dam and reservoir is in Section 28—

(Testimony of Thomas W. Clagett.)

A. There is no site below the dam in Section 28, consequently any selection would have to be above the dam in Section 28.

Q. Did they go with the idea of locating a dam or reservoir site above Section 28?

A. I don't think at this time they intend to locate a dam or reservoir site above Section 28.

Q. Have you heard them talk about getting a reservoir site above the dam which this company is now building?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant and immaterial.

A. Why, for many months— [812—756]

Q. Answer my question "Yes" or "No."

A. I cannot answer except in my way. We have been considering the question of a dam site in connection with an irrigation project on Willow Creek and I don't know anything more than what has been considered in the past. Since they came the question of Willow Creek has not been talked of between us.

Q. You commenced to consider that since the work has been going on by the defendant company?

A. Yes, sir.

Q. Will you say you did not discuss the other day, you and Mr. Martin, and Mr. Mackenzie, the question of locating a reservoir site at once?

A. We did not. The question of beginning and taking active steps toward an irrigation system has been discussed but the question of a reservoir or any particular reservoir never came up.

Q. Wasn't the question of locating a reservoir

(Testimony of Thomas W. Clagett.)

above Section 28 on Willow Creek?

A. There was not.

Q. That is what they went up for, to see where the location of the reservoir site could be located?

A. It was.

Q. And they went up to get a location for a reservoir above the dam site in Section 28 now being built by the defendant company and below the other reservoir site which the defendant company has acquired?

A. I have said I do not know that *it their* intention and I do not believe it is their intention.

Q. Wasn't it done for the purpose of again check-mating this company? [813—757]

A. No, sir; only indirectly.

Q. Now, Mr. Clagett, didn't you testify or swear in your—now Mr. Clagett, I want you to tell the value of that land in Section 27, Township 14 South, Range 42 East—

Mr. HUNTINGTON.—Objected to as incompetent, as having been fully gone into and improper cross-examination.

Q. —for any and all purposes?

Mr. HUNTINGTON.—And having been fully answered by the witness.

A. As to what value would be placed upon the dam site by those competent to put a value upon it for reservoir purposes I do not know. The only knowledge I have is as to its value for that purpose is as I have stated.

Q. For what—how much is that?

Mr. HUNTINGTON.—Objected to as incompe-

(Testimony of Thomas W. Clagett.)

tent, as having been fully gone into and improper cross-examination.

A. The land of which our land was a part, with the ditches, was sold for \$20,000.00 according to what the *record* of the county show. The ditch was never worth over a thousand dollars a mile, or \$5,000.00 for the ditches in its first condition. Worn into decay it would not be worth \$15,000.00. Of the land which was sold there were 280 acres. Of this land we claim to own 110 acres, and the only way I could appraise the land would be by saying that it would be for the proportionate part or about three-eighths of the price [814—758] the records show it was sold for. I am not an engineer and I cannot pass upon its value for reservoir purposes.

Q. So far as you know it has no value for reservoir purposes. A. No—

Mr. HUNTINGTON.—Objected to as incompetent, not proper cross-examination and witness has explained his attitude in that matter fully.

.WITNESS.—The land has a value for reservoir purposes.

Q. Now, $\frac{3}{8}$ would be how much money?

A. Why, about \$6,000.

Q. And that includes the land in Section 21 and also in Section 27?

A. Not all of the land in either 21 or 27. It includes the land embraced in the filings of the company on those sections that we own.

Q. How much in Section 27?

(Testimony of Thomas W. Clagett.)

A. There are two claims—I believe there are sixty acres.

Q. I don't care about your claims—how much land does the dam occupy in Section 27?

Mr. HUNTINGTON.—Objected to as immaterial, incompetent and the witness has not shown that he has surveyed that or surveyed the contour lines of the reservoir.

WITNESS.—I do not remember the exact contour of the ground on 27 so far as the drawing away of the hill is concerned, and I have never run the contour lines on 27, but, hazarding a guess, I would think the water would not cover over twenty acres of twenty-seven. [815—759]

Q. The dam and the water?

A. The dam and the water; yes, sir.

Q. And about how much would it cover in Section 21?

Mr. HUNTINGTON.—Objected to as immaterial, incompetent and the witness has not shown that he has surveyed that or surveyed the contour lines of the reservoir.

A. I cannot answer that because, while I have not run the contour lines, but I have been told the contour line does not cover all of our land in 21 That is a mistake. It covers all our land in 21 aside from the hill and I don't know how high on the hill the contour line runs.

Q. You filed the original complaint in this case?

A. I subscribed to it.

Q. And the amended complaint? A. Yes, sir.

(Testimony of Thomas W. Clagett.)

Q. And you swore to that before a Notary Public, Mr. Eastham? A. I did.

Q. And in that you use this expression—the original complaint: “And your orator further shows that it is the purpose of the defendant and that it is threatening to and will unless restrained by an order of this Court complete such dam for the purpose of obstructing the flow of water in the natural channel of Willow Creek, and to create a large reservoir for the storage and retention of water flowing in Willow Creek above said dam and by means of said dam is intending to and will, unless restrained by order of this Court, flood and overflow a portion of the west one-half of the southwest one-fourth of Section 27, and all of the south half of the southwest one-fourth and the southwest one-fourth of the [816—760] southeast one-fourth of said Section 21 to the great and irreparable damage of your orator, and your orator further shows unto the Court that the lands occupied and to be by said proposed dam and by the reservoir thereby created is of large value, to wit, of the value of \$4,000.” You signed that complaint and swore to it, didn’t you?

Mr. HUNTINGTON.—Objected to as not proper cross-examination and not a proper method of cross-examination.

A. I did.

Q. You remember the allegations?

A. I don’t remember all of them.

Q. I will let you look at them to see if I have read it straight. A. I remember those you have read.

(Testimony of Thomas W. Clagett.)

Q. Now, that was sworn to on the 5th day of October, 1908, wasn't it? A. Yes, sir.

Q. Then, afterwards an amended complaint was prepared, wasn't there? A. Yes, sir.

Q. And in that amended complaint did you not also say: "And your orator further shows unto the Court that the lands occupied and to be occupied by said proposed dam and by the reservoir thereby created is of large value, to wit, of the value of \$4,000"? You stated that in the amended complaint, didn't you? A. I did.

Q. And that had reference to all of the lands claimed by the [817—761] complainant company located in Section 21, and all the lands claimed by the complainant company located in Section 27 on which the dam site or dam stood and which would be covered by water when the dam was filled?

A. It did.

Q. When the amended complaint was filed you know that it was filed because the defendant company was claiming, amongst other things, that the Circuit Court of the United States did not have jurisdiction of this case because the value in controversy was less than \$2,000—that was one of the purposes for filing the complaint?

Mr. HUNTINGTON.—Objected to as incompetent, not the best evidence, and for the further reason that this witness was not one of the attorneys in that case.

A. I did not.

Q. Did you not know that it was one of the con-

(Testimony of Thomas W. Clagett.)

tentions of the defendant company pertaining to the original complaint that the value of all the matters in controversy did not exceed \$2,000, and that you had overstated it to give jurisdiction to the Court?

A. I did not. I never saw the answer.

Q. Did you not make an affidavit, which was used in the hearing in the Circuit Court and in opposition to the showing made by the defendant when the defendant claimed that the value of all the property in controversy was less than \$2,000, and that the Federal Court did not have jurisdiction? Now, didn't you make an affidavit to disprove the contention of the defendant company? [818—762]

Mr. HUNTINGTON.—Objected to as incompetent, immaterial, not proper cross-examination and not the proper method of cross-examination.

A. I remember making an affidavit; I don't remember all the allegations in the affidavit.

Q. Well, if there was an allegation saying that was one of the main purposes of the affidavit do you think you would remember it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination and not the fact.

A. I don't think there was any such allegation in the affidavit. If there is I undoubtedly knew at that time it was.

Q. Then if there is such a statement in your affidavit you knew then that the amount in controversy was a material thing when the amended complaint was filed, did you not?

Mr. HUNTINGTON.—Objected to as not proper

(Testimony of Thomas W. Clagett.)

cross-examination, as based upon a supposition—a fact which does not exist, as not a proper method of cross-examination and for the further reason that the affidavit shows for itself, and for the further reason that the amended answer was not filed for the purpose of giving the Federal Court jurisdiction but for the purpose and only for the purpose of making definite and certain the description of the lands which the complainant company alleged were riparian lands. In the original complaint these lands being described as a certain number of acres through which the channel of Willow Creek ran and [819—763] situated in Malheur County, Oregon. The amended complaint particularized that description by giving the legal subdivisions. This question is asked apparently for the purpose of misleading the witness and confusing the record, is incompetent and not proper cross-examination.

Mr. HUNTINGTON.—We insist, before the witness answers this question, the affidavit to be submitted to him before his examination and if this is not done that the witness refuse to answer the question until the affidavit is submitted to him.

Mr. HART.—Read the question. (Previous question read to witness.)

WITNESS.—I had known for many years that an amount in controversy had to be at least or in excess of \$2,000 to be brought into the Federal Court.

Mr. HART.—Read the question and ask the witness to specifically answer it.

(Previous question again read to witness.)

(Testimony of Thomas W. Clagett.)

Mr. HUNTINGTON.—I instruct the witness he has a right to examine his affidavit before he is compelled to answer that question and that he can lawfully refuse to answer the question until the affidavit is submitted to him.

(Previous question read to witness.)

Mr. HART.—Yes or no.

WITNESS.—Let me see what the statement is.

Q. Do you mean to say you don't remember what you swore to?

A. I have said already I don't remember all the allegations.

Q. Will you say you did not swear to such a statement before Mr. Huntington as a Notary Public?

Mr. HUNTINGTON.—Objected to as not proper cross-examination [820—764] and not proper method of cross-examination and direct the witness not to answer the question until the affidavit is submitted to him for his inspection.

Mr. HART.—Read the question again please, Mr. Davis. (Previous question read to witness.)

WITNESS.—I decline to say until I have seen the affidavit.

Q. After Mr. Huntington has told you you follow his advice—you decline? A. Yes, sir.

Q. When he was making another objection and explaining the nature of an answer that could be made he used the word "contour," and therefore you immediately adopted that suggestion and used the word "contour" in your evidence too, didn't you?

Mr. HUNTINGTON.—Objected to as not proper

(Testimony of Thomas W. Clagett.)

cross-examination—the question is wholly uncalled for and unwarranted.

Q. Well, sir, since you want to see it, and don't know anything about it, I will show it to you. In the first place, I will turn over here and look at the signature: "Mr. Clagett, before B. S. Huntington, Notary Public." That is the attorney in this case?

A. Yes, sir.

Q. Now, I will call your attention—

Mr. HUNTINGTON.—I don't see why you could not have done this in the first place.

Mr. HART.—I did the same thing you did with Mr. Kelly without showing it to him and I did not take any exceptions to your [821—765] actions.

Q. Now, in the affidavit that I called your attention to does this expression occur? Are you looking at your affidavit now?

A. Yes, sir. I was going to say I want to consider it as a whole, not in part.

Q. Oh, yes, sir, you can read it all. Have you not read your affidavit over?

A. I did when I signed it several months ago.

Q. You have no remembrance of it?

A. I have a remembrance of what I understood was the matter in controversy. I cannot state at this time the particular time or particular form of the allegations.

Q. I did not ask that question. Read what my question was so as to get it exactly—do you remember the substance of the allegations in your answer?

A. Why, no, I do not. It was a three or four

(Testimony of Thomas W. Clagett.)

page affidavit. I cannot remember them all.

Q. But you would not swear to anything in them. that is not true?

A. I would not swear to anything except what I believed true.

Q. Nor anything but what you believed to be the truth? A. No, sir.

Q. Did you swear to this in the affidavit: "That there was not on my part nor on the part of the complainant any desire or motive to overestimate the value of said property and such value was not so alleged for the sole purpose of conferring the jurisdiction on this Court"; "That it is not true that the complainant at all times well knew or at all knew that the true and correct amount in controversy did not and does not involve a dispute within the jurisdiction of this Court"? [822—766]

A. Change that "and" to "or."

Q. Where? A. "Or does not."

Q. "In controversy did not or does not involve a dispute within the jurisdiction of this Court." Now, did you make that statement in the affidavit?

A. I recall the statement.

Q. How is it? A. I recall the statement.

Q. You do recall then now that at the time the amended complaint was filed the question of the jurisdiction of the Court growing out of the amount involved was at issue, don't you? A. I do.

Q. Your memory to this extent has been refreshed? A. Yes, sir.

Q. And you wish to recall the statement awhile

(Testimony of Thomas W. Clagett.)

ago that you didn't know anything about—if you made that statement in substance you wish to recall it?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

A. I do. I stated to the best of my recollection.

Q. Now, I will call your attention to Section 15, Township 15 South, Range 42 East. Does it show upon the map you have? A. Yes, sir.

Q. A portion of that is a mountainside or bluff side, isn't it? A. It is.

Q. And other portions are a piece of bench land that has [823—767] sagebrush growing on it?

A. Yes, sir.

Q. What is the value of that land in that section?

A. In its present condition, without water?

Q. Just as it stands there now an acre?

A. I cannot state because there is agricultural land upon this section and I do not know the acreage of it.

Q. That is not different from the other bench land, is it?

A. Yes, sir, that is above the canyon.

Q. Different from above the canyon?

A. Yes, sir.

Q. I am not speaking of that. Is that any different from the bench land up the valley that has sagebrush growing upon it? A. No, sir.

Q. What would you say is the value of that land then? A. Well—

Q. Per acre?

A. —the land which lies above the canal line

(Testimony of Thomas W. Clagett.)

would only be good for stock—

Q. I am not talking about canal lines.

A. I am answering that. The value of the land that lies above the canal line or possible irrigation is only worth a nominal figure for grazing purposes. The lands lying below the canal line would have a value for irrigation possibilities.

Q. What is it?

A. I cannot state unless I know what other land has been sold for.

Q. There is no canal there now?

A. There is not. [824—768]

Q. If you take the property as it exists to-day what is it worth?

A. It is worth in my estimation from \$10 to \$30.

Q. \$10 to \$30 an acre?

A. Yes, sir, the land that can be irrigated.

Q. And all that is growing on it is sagebrush?

A. That is all.

Q. And about what proportion of it is mountain-side?

A. I don't know how much of the section but very little—well, I will withdraw that. I do not call that a mountain at all; there is a large hill on that section.

Q. But it is a bluff side?

A. I do not know what proportion, but a small proportion of it is bluff side.

Q. Mr. Clagett, when this suit was instituted it was sought by the complainant company to secure an injunction against the defendant company, wasn't it?

A. Yes, sir.

(Testimony of Thomas W. Clagett.)

Q. An application was made for an injunction?

Mr. HUNTINGTON.—If the Court please, that is not proper cross-examination. The records of the court show all that has been done in that case and it is the best evidence.

A. There was.

Q. You, of course, understand that the greater injury which you could show you had suffered makes your appearance in court stronger?

Mr. HUNTINGTON.—Objected to as incompetent, irrelevant, [825—769] immaterial and consuming a vast amount of time and encumbering the record for a useless purpose.

A. I don't think it would.

Q. You don't. You swear in the original complaint filed in this case—or the amended complaint I am speaking of first—maybe you would like to look at that? Take a look at it. A. What part of it?

Q. You said you wanted to look at it all.

A. Well, if you are not going to ask about it all—

Q. You feel a little different about the complaint than the affidavit?

Mr. HUNTINGTON.—What is the use of all this? You know how to examine a witness if you know anything and it seems to me that we ought to proceed with the examination.

Q. In the original complaint, or in the amended complaint which was filed you put forth the description of large tracts of land and ended the description with the expression: "Which lands aggregate 7120 acres, all of which are riparian to Willow

(Testimony of Thomas W. Clagett.)

Creek," didn't you? A. I did.

Q. Was that true?

A. According to what I believed; yes, sir.

Q. According to the fact is that true?

A. So far as I know it is still true; yes, sir. Except that it has been pointed out in this hearing that there was a mistake made of 160 acres in Section 25, Township 16 South, Range 44 East, which we do not own. [826—770]

Q. "That complainant is the owner in fee simple of all such lands and its predecessors in interest have been the owners of all of said lands ever since the year 1867; that about 3,600 acres of said lands are located in the lower level of Willow Creek valley and are subject to annual overflow from the waters of Willow Creek." Did you state that there were 3,600 acres that were subject to annual overflow from the waters of Willow Creek, a part and portion of the land you have described?

A. I did not mean the whole 3,600 acres were overflowed. Let me see the statement.

Q. I am not asking now about what you meant; I am asking about the statement you made. "That about 3,600 acres of said lands are located in the lower level of Willow Creek valley and are subject to annual overflow from the waters of Willow Creek." Did you make that statement?

A. My statement as made there ran to the location of the 3,600 acres; yes, sir.

Q. Do you mean to swear you did not put in there that 3,600 acres were subject to overflow?

(Testimony of Thomas W. Clagett.)

A. My affidavit is there.

Q. Did you intend to convey that to the Court?

A. I did not.

Q. Does it convey that to the Court?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, incompetent and from what the Court may understand—this witness cannot say what the Court will understand from the allegation.

Q. Didn't you say that about 3,600 acres located in the [827—771] lower valley of Willow Creek and are subject to annual overflow? Now, didn't you make that statement?

A. That is what the affidavit states.

Q. The complaint?

A. The complaint and affidavit.

Q. You swore to it? A. I did.

Q. It wasn't true, was it?

A. In the meaning of those words *are* there, that 3,600 acres are overflowed annually it is not true.

Q. And there are some things in Mr. Kelly's affidavit that he says are not true too?

Mr. HUNTINGTON.—Objected to as not proper cross-examination.

Q. I say there are some things in Mr. Kelly's affidavit that he says are not true too.

A. That is for Mr. Kelly to say—the affidavit shows—

Q. I asked if there are not some things in Mr. Kelly's affidavit that he says are not true.

A. Mr. Kelly made the statements as contained in that affidavit and swore to them and it is for him

(Testimony of Thomas W. Clagett.)

to say whether they are true or not.

Q. I am not asking you pertaining to that at all.

A. You asked me if they were true or not.

Q. I asked if there are statements in the affidavit that you know that Mr. Kelly says are not true.

A. I have heard him say at this trial that he did not believe they were true.

Q. And you read that affidavit and copied it?
[828—772] A. I did.

Q. And there are statements here in the complaint going before the Court that there are 3,600 acres of land overflowed of the land you described, that is not true?

A. I have answered that question.

Q. And now you admit that the amount of land that is overflowed is in small pieces being about in the vicinity of 400 acres all told?

A. That is all I claim that is overflowed; yes, sir. I say actually overflowed.

Q. Did you not also state in the complaint "And during said period" [that is, referring to from about the first of February until about the first of May], "And during said period the waters overflow the bank of said creek in said valley covering the lands [the word here is "and," I presume it meant "as"] and hereinabove described called the bottom lands." Did you make that statement too?

A. That is in the complaint.

Q. Did you not make this statement also, "That by reason of such saturation the flow of the water in the channel of Willow Creek through said valley is

(Testimony of Thomas W. Clagett.)

naturally maintained and continued during a large portion of the summer months, and without such saturation the channel of said creek through said valley during the months of July, August and September would be nearly if not quite without water''?

A. I did.

Q. Well, you know that the channel is nearly if not quite without water during the months of July, August and September whether they have flood waters or do not have them, don't you?

A. I have heard it said so; since I have been in the country [829—773] there has been no flood water virtually.

Q. Every witness you have put upon the stand has testified to that.

Mr. HUNTINGTON.—Objected to as irrelevant, incompetent and not proper cross-examination.

A. I believe that to be true from what is told me; yes, sir.

Q. Did you know that to be the fact at the time you swore to that complaint?

Mr. HUNTINGTON.—Objected to as not proper cross-examination, the complaint is sworn to to the best of the witness' belief. That is the form of the affidavit and the counsel knows it. The witness says he believed it to be true at that time.

Q. You knew it was true the creek was dry in every year probably during the months of July, August and September when you swore to that complaint?

Mr. HUNTINGTON.—Objected to as not proper

(Testimony of Thomas W. Clagett.)

cross-examination—the same objection as last above.

A. I knew it.

Q. Now you—I will call your attention again to the affidavit which I handed you a moment ago, sworn to before Mr. Huntington—you have seen it?

A. I have.

Q. I will ask you if in that affidavit you did not use—say this—when you signed that affidavit did you hold up your hand before Mr. Huntington and swear: “I swear that [830—774] is true”?

Mr. HUNTINGTON.—Objected to as incompetent and not proper cross-examination.

Q. Did you?

A. I don't remember whether I held up my hand or not; I remember swearing to the affidavit before him.

Q. Well, in that affidavit, did you state: “It is true there is no detail description by legal subdivisions or *meets* and bounds of the 3,600 acres referred to in the Bill *fo* Complaint but the same is described as lands owned by the complainant which are riparian to and through which Willow Creek runs, that as a matter of fact said lands consists of the portions of the lands hereinafter described which are the so-called bottom or lower level of Willow Creek valley”? Did you make that statement in your affidavit? A. It is in the affidavit.

Q. Well, do you recall of making it?

A. I do not particularly recall that particular statement; no, sir.

Q. You don't remember that?

(Testimony of Thomas W. Clagett.)

A. I don't remember it; no, sir.

Q. Have no memory of it? A. No, sir.

Q. Well, is it true or not?

A. Why, I think it is so far as the lands are described there.

Q. Then, I will ask you if your affidavit did not proceed and give a description of a lot of land?

A. I did.

Q. Then I will ask you if this expression does not occur in [831—775] your affidavit, "Which lands aggregate 7,120 acres and of which 3,600 acres lie in the lower levels of the valley." Did you make that statement in your affidavit? A. I did.

Q. I will ask you if you did not make this statement also: "That said valley is quite level and have a width of from a few yards to three-quarters of a mile, is elevated a very little above the level of the banks of the creek; that such lower lands are usually referred to and called the bottom; that in some parts of the valley the land slopes gradually from the bottom to the higher bench, while in other portions of the valley the slope to the other bench of the valley is abrupt; that all or nearly all of the bottom land is subject to overflow." Did you make that statement?

A. That is in the affidavit; yes, sir.

Q. Well, did you make the statement in the affidavit?

A. I signed the statement in the affidavit.

Q. Did you authorize that statement to be put in the affidavit?

(Testimony of Thomas W. Clagett.)

A. I authorized it; Mr. Huntington put it into the affidavit.

Q. Did he get his information from you?

A. No, sir, from the ground itself.

Q. And when you put in there that there was 3,600 acres of bottom land and the other expression that all or nearly all of the bottom land is subject to overflow, that is not true, is it?

A. It is not true; no, sir.

Q. Now, do you know a gentleman by the name of Mr. Grimes, do you? A. I do.

Q. You procured an affidavit from him also too, didn't you, to [832—776] be used at that affidavit hearing? A. Mr. Huntington did.

Q. Were you there? A. No, sir.

Q. You were not there? A. No, sir.

Q. Did you talk with Mr. Grimes about this affidavit before it was signed?

A. No, sir, I did not.

Q. Now, in that affidavit that was used on behalf of your company and sworn to by Mr. Grimes on the application for an injunction, I will call your attention to the affidavit, sir, so that you may see it—Grimes—this doesn't seem to be signed but it is the copy you furnished us, isn't it, Mr. Huntington?

Mr. HUNTINGTON.—Object to the examination of this witness as to any matters touching the affidavit of Mr. Grimes, not having been prepared in the presence of this witness. And it not appearing that this witness was present or ever talked with Mr. Grimes about his affidavit, nor knows anything

(Testimony of Thomas W. Clagett.)

about the affidavit of Mr. Grimes farther than that it was filed in this case, as improper cross-examination, incompetent, irrelevant, immaterial and wholly without any rule of evidence ever formed or ever used.

Q. Mr. Clagett, did you ever talk with Mr. Grimes about his affidavit? A. I never did.

Q. And you never saw his affidavit? [833—777]

A. I have seen it and heard it read.

Q. Did you hear it read before it was submitted to the Court before the hearing in Portland in this controversy down below?

A. Were all the affidavits taken before that hearing?

Q. Yes, sir. A. Yes, sir, I did then.

Q. And you knew then the substance of it?

A. I did probably.

Mr. HUNTINGTON.—Our objection goes to all this examination.

Mr. HART.—Yes, sir.

Q. Did you know that all of the affidavits would be used in that hearing before the Court?

A. I knew all of the affidavits were to be used before the Court; yes, sir.

Q. You never made any objection to the use of the affidavit made by Mr. Grimes?

A. I never did and know of no reason why I should.

Q. I will ask you if Mr. Grimes, in the affidavit which you saw, if it did not contain this statement: “That during the portion of the year when the snow

(Testimony of Thomas W. Clagett.)

in the mountains and hills is melting and the rain is falling, commencing generally in February and continuing until about the first of May an amount of water flows down the Willow Creek valley in excess of the capacity of the natural channel of Willow Creek, and, as a result, the lowest part of the land along Willow Creek is inundated, and that the water spreads out over a strip of the valley in width [834—778] from a few rods to three-quarters of a mile or a mile in width the entire length of the valley.” When you saw that statement in the affidavit, knowing that it was to be submitted to the Court on the temporary injunction hearing, you knew that wasn’t true, didn’t you?

A. I did not.

Q. You now know that water did not spread out the entire length of the valley from a few rods to a mile?

A. All the knowledge I have is what I have been told, and I have been told that the entire valley from hill to hill is covered with water.

Q. You know your case is based upon the annual overflow? A. Yes, sir, I do.

Q. And you know that is not true, don’t you?

A. Not every year; no, sir.

Q. Did you observe Mr. Grimes’ statement to the following effect in that affidavit: “As a result of such inundation the lands was inundated and those immediately adjacent thereto become thoroughly saturated and by reason of such inundation and

(Testimony of Thomas W. Clagett.)

saturation the riparian lands along Willow Creek to the extent that they are so saturated are very valuable for the raising of alfalfa and other hay crops." Did you observe that statement in the affidavit?

Mr. HUNTINGTON.—Of course, this goes in under our general objection.

A. I observe the statement now. I do not know at the time the affidavit was read whether I observed it or not.

Q. You know that the water that overflows the land the land is then subject to produce wild hay and wire grass and such stuff?

A. I do. [835—779]

Redirect Examination by Mr. HUNTINGTON.

Q. Mr. Clagett, you made the remark, or you answered one of the questions of defendant's counsel with respect to the purpose for which Mr. Martin had started for the upper valley, and particularly a question as to his purpose in examining the upper valley with respect to an irrigation system and as to whether or not his journey there was not for checkmating the defendant company. You said "indirectly checkmating them." Just state what you mean by that.

A. The Willow Creek Valley—I am speaking of the entire valley—does not admit of two separate irrigation projects and if a project was put in which should supply the entire valley it would, so far as the project of this defendant company is concerned affect them aside from their own individual holdings. That is what I referred to.

(Testimony of Thomas W. Clagett.)

Q. That is, as I understand you, if a project is put in which is sufficiently comprehensive to irrigate all the lands of the valley it would interfere, and, to a certain extent, checkmate the defendant company's project for the irrigation of its lands, is that what you mean?

A. No. I thought I said that it would affect it aside from its own lands. I meant that if the defendant company had in view the putting in of a project which would serve the whole valley, which we do not know whether they have or not, and another company undertook at this time to put in a project to serve the valley, the two necessarily would come in conflict, and to that extent if Mr. Brogan or the defendant company has had that in mind it would to that extent interfere [836—780] with, or checkmate, his plans.

Q. Did you ever see the contour lines run on Section 21 in the canyon above the proposed dam site?

A. I never did. I have not even looked at the map.





